Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

LEEANDER JEROME BLAKE,
Respondent.

On Petition for Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
ANNABELLE L. LISIC
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6428

Counsel for Petitioner

**Counsel of Record*

QUESTION PRESENTED

Leeander Blake was arrested on October 26, 2002, and charged with the first degree murder of Straughan Lee Griffin. At the police station, Blake invoked his right to counsel after being advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The police immediately ceased questioning and placed Blake in a holding cell. Thirty-five minutes later, Detective William Johns went to Blake's cell, gave him a copy of his arrest warrant and charging papers, and told Blake to read them carefully. Officer Curtis Reese, a patrol officer, walked with Detective Johns to the cell, and, after the paperwork was handed to Blake, said, "I bet you want to talk now, huh." Detective Johns shoved Officer Reese from the room, telling him that Blake had asked for an attorney and they could not talk to him. Approximately 30 minutes later when Detective Johns brought Blake some clothes, Blake asked, "I can still talk to you?" The detective confirmed that Blake wanted to talk to him, readvised him of his *Miranda* rights, and obtained Blake's waiver of his right to counsel. The Court of Appeals of Maryland held that there had been a violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). The question presented is:

When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards* permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?

PARTIES TO THE PROCEEDING

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Blake v. State*, 381 Md. 218, 849 A.2d 410 (2004), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in Appendix A. (App. 1a-29a).

The unreported opinion of the Court of Special Appeals of Maryland, *State of Maryland v. Leeander Blake*, No. 771, September Term, 2003 (filed October 29, 2003), is reproduced in Appendix B. (App. 30a-58a).

The unreported opinion of the Circuit Court for Anne Arundel County, Maryland, in *State of Maryland v. Leeander Jerome Blake*, Nos. K-2002-2154, K-2002-2417, granting Blake's suppression motion, is reproduced in Appendix C. (App. 59a-87a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland was filed on May 12, 2004. The Court of Appeals denied a motion for reconsideration on June 16, 2004. This petition is filed within 90 days of the denial of the motion for reconsideration, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 19, 2002, Straughan Lee Griffin was shot and killed in front of his home in the historic district

of Annapolis. (App. 3a). His assailants shot him in the head, stole his automobile, and ran over his body as they fled the scene. (App. 3a).

On October 25, 2002, Terrence Tolbert was arrested in connection with the homicide and implicated Blake. (App. 4a). On the following day, October 26, 2002, the Annapolis Police executed a search warrant at Blake's home. (E. 226).[1] Prior to the search, Sergeant Greg Kirchner instructed all officers present at a briefing not to speak to Blake should they encounter him at the house. (E. 226). At 5:08 a.m., the authorities arrested Blake at his home. (App. 4a). Blake was transported to the Annapolis Police Department, where Detective William Johns advised Blake of his rights pursuant to *Miranda*. (App. 4a). Blake indicated that he did not want to talk to the police without an attorney. (App. 4a). Accordingly, Blake was placed in a holding cell at the police department at 5:25 a.m. and no further questions were asked of him. (App. 4a).

At 6:00 a.m. Detective Johns went to Blake's cell and handed him a copy of his arrest warrant and statement of charges,[2] explaining the charges to him, and telling him to

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[1] The references herein to E. are to the Record Extract that was filed in the Maryland Court of Appeals in *Blake v. State*, 381 Md. 218, 849 A.2d 410 (2004).

[2] These computer-generated papers indicated that the death penalty was the maximum possible punishment for first degree murder. The crime at issue, a killing

read the document carefully. (App. 4a-5a). As Detective Johns turned to walk out, Officer Curtis Reese, a uniformed patrol officer with no connection to the investigation, who had walked back to the holding cell with Detective Johns, said, "I bet you want to talk now, huh." (App. 5a). Surprised by the unexpected comment, Detective Johns said, very loudly, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." (App. 5a-6a). Detective Johns then walked Officer Reese out of the cell block. (App. 6a). Detective Johns did not want Officer Reese to say anything more that could be heard by Blake and he did not want to hear anything Blake might say. (App. 6a). Detective Johns testified that Blake would have heard his admonition to Officer Reese. (E. 37). The detective then reported the incident to his supervisor, Sergeant Kirchner. (E. 38).

Approximately thirty minutes after giving Blake the charging papers, Detective Johns returned to the holding cell to give Blake clothes which had been delivered to the police department. (App. 6a). As Detective Johns was about to leave the cell, Blake asked, "I can still talk to you?" (App. 6a). Detective Johns asked whether Blake was saying that he wanted to talk to Johns. (App. 6a).

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during a robbery and carjacking, qualified for imposition of the death penalty. A later determination as to the age and mental capacity of a given defendant might make that defendant ultimately ineligible, *see* Md. Ann. Code, Crim. Law, § 2-202 (2002), as was the case here, but that stage had not yet been reached at the time Blake received the papers.

Blake replied, "Yes." (App. 6a). Blake was returned to the interview room, read his rights again, and agreed to provide a statement without an attorney. (App. 6a).

Blake testified that he decided to talk to the authorities after hearing Officer Reese's comment and then seeing the charges he was facing, including a possible death penalty. (App. 7a). In addition, when he read the complete charges, he saw for the first time that Tolbert said that Blake was the shooter and the person who ran over the victim while leaving the scene. (E. 205-06). Blake felt angry and betrayed and wanted the police to know the truth. (E. 208).

On June 3, 2003, the suppression court issued an oral ruling granting Blake's suppression motion. (App. 59a-87a). According to the suppression court, Officer Reese's statement to Blake, after Blake had invoked his right to counsel, constituted the functional equivalent of interrogation, in violation of *Miranda*, *Rhode Island v. Innis*, 466 U.S. 291 (1980), and *Edwards*. (App. 72a-78a). The suppression court concluded that Detective Johns's actions immediately after Officer Reese's remark did not change that result. (App. 74a). The court also found that there was no showing of a voluntary waiver of the right to counsel. (App. 81a).

The Court of Special Appeals of Maryland reversed that ruling. (App. 30a-52a). The court found that Blake's statements were admissible at trial because Officer Reese's remark did not constitute interrogation and that Blake's subsequent waiver was voluntary. (App. 52a).

The Court of Appeals of Maryland reversed the judgment of the Court of Special Appeals of Maryland. (App. 2a-3a). Based on its review of Supreme Court law subsequent to *Innis* and *Edwards*, including *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the court held that, pursuant to *Innis*, the comment of Officer Reese to Blake after Blake invoked his right to counsel was the functional equivalent of interrogation and not a rhetorical question. (App. 20a-22a). According to the court, Officer Reese's comment was directed at Blake and could only be read as encouraging Blake to speak. (App. 21a-22a). The court did not believe that the subsequent actions of Detective Johns cured the violation. (App. 26a-27a). Further, the court found "no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation." (App. 26a). The court held that Blake himself never initiated contact with the police after invoking his *Miranda* rights. (App. 27a).

REASONS FOR GRANTING THE WRIT

This case raises an issue that the Court has not yet addressed, but which is vitally important to both prosecutors and police. That issue is whether *Edwards* allows for curative measures or intervening circumstances to play a decisive role in determining whether a suspect has initiated further contact with the police.

The narrow, straitjacket approach employed by the Maryland court results in the unnecessary loss of critical evidence and should not be required under *Edwards*. Rather, this Court should recognize that, consistent with

Oregon v. Elstad, 470 U.S. 298 (1985), even when there has been a *Miranda* violation, *Edwards* allows for initiation of contact by a suspect with the police and waiver of the right to counsel after an earlier invocation of that right. The validity of such an initiation requires consideration of the totality of the circumstances, including curative measures taken by the authorities and any intervening circumstances between invocation and initiation of communications.[3] Recently in *Missouri v. Seibert*, 124 S. Ct. 2601 (2004), this Court fashioned just such a pragmatic analysis when the police failed to give any *Miranda* warnings. The same reasoning is appropriate in an *Edwards* analysis.

The draconian result mandated by the lower court and the divergence of opinion in lower courts as to whether an *Elstad* analysis would apply in the context of an alleged *Edwards* violation strongly suggest that guidance by this Court is needed. As a practical matter, and contrary to the reasoning of the Maryland court, any *Edwards* analysis must certainly take into consideration intervening circumstances and/or curative measures taken between invocation of the right to counsel and later waiver of the right, regardless of any prior impropriety. The Court should use this opportunity to re-examine *Edwards* and *Bradshaw* and offer a pragmatic, yet effective,

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[3] Although the State contested in the courts below the issue of whether Officer Reese's statement constituted an interrogation within the meaning of *Innis*, the State is not presenting that question to this Court and is therefore assuming *arguendo* that it was interrogation.

prophylactic rule in assessing an alleged *Edwards* violation.

Police and prosecutors would be better served by a more pragmatic rule with fewer negative societal results. Indeed, in this case, it is especially critical to review the decision of the state court. In ordering suppression of Blake's statement, the court has not only deprived the State of critical evidence, but, under state law,[4] allowed Blake to go free, forever immune from prosecution for the murder of Straughan Lee Griffin.

I. This Court Has Not Decided Whether *Edwards* Allows for Consideration of Curative Measures or Intervening Circumstances in Determining Whether a Suspect Has Initiated Further Contact with the Police.

This Court has not yet addressed a recurring issue presented to lower courts and law enforcement: when a police officer initiates contact in violation of a suspect's earlier invocation of the right to counsel, may curative measures or intervening circumstances result in a finding that the suspect has initiated contact with the police and that there has been no *Edwards* violation?

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[4] Maryland law mandates that, if the State unsuccessfully appeals an unfavorable ruling by the suppression court, the charges against the defendant must be dismissed and the State "may not prosecute the defendant on those specific charges or on any other related charges arising out of the same incident." Md. Ann. Code, Cts. & Jud. Proc., § 12-302(c)(3)(iv) (2002).

The prophylactic rule of *Miranda* requires that, once advised of the right to counsel, police may not interrogate a suspect until counsel has been provided. 384 U.S. at 479. In *Edwards*, the Court recognized the overriding principle that any waiver of the right to counsel must, under the totality of the circumstances, be "a knowing and intelligent relinquishment or abandonment of a known right or privilege." 451 U.S. at 482 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). The Court held that "an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85 In *Bradshaw*, the Court focused on the meaning of "initiation" in the context of *Edwards*. A plurality of the Court defined initiation as something said by the accused "evinc[ing] a willingness and a desire for a generalized discussion about the investigation." *Id.* at 1045-46.

The rule emerging from *Edwards* and *Bradshaw* is that the police must respect a suspect's invocation of the right to counsel, but that a suspect may later initiate contact with the police and validly waive that right. In that case, the validity of the waiver is dependent on the totality of the circumstances. This Court has not, however, addressed the situation where, as here, between a suspect's invocation of the right to counsel and his initiation of further contact with the police, the police initiated contact with the suspect. The Court thus has not specified the test to be applied in that situation or the relevant facts that bear

on its application.

In this case, a number of factors should have led the Court of Appeals of Maryland to hold that Blake's initiation of contact with the police was not "tainted" by the earlier communication by the police. It is undisputed that Detective Johns properly administered *Miranda* advisements to Blake, and ceased questioning once Blake asked for an attorney. As part of permissible booking procedures, Detective Johns gave Blake a copy of the charging papers and read those charges to him, telling Blake to read the papers carefully. Blake said nothing after Officer Reese's comment and Detective Johns immediately shut down any possible conversation. Blake admitted that he first learned from reading the charging papers that Tolbert was placing all of the blame on him for the vicious murder and described himself as angry and betrayed and intent on letting the police know the truth. Thus, when Detective Johns brought Blake some clothes thirty minutes later, Blake asked whether he could still talk to the police, clearly not interpreting Reese's earlier remark as an invitation to talk to the authorities. Detective Johns asked Blake if he meant that he wanted to talk to the police, to which Blake responded that he did. Blake was then readvised of his *Miranda* rights, waived those rights, and confessed.

Absent guidance from this Court on the issue, the Court of Appeals of Maryland found that Blake's question was the result of Officer Reese's remark and that any statement Blake made subsequently without the presence of counsel was inadmissible. (App. 27a-28a). This Court

should grant certiorari to inform the lower courts, and law enforcement officers, of how properly to assess whether an improper statement by police, following a suspect's invocation of the right to counsel, is cured by actions of law enforcement officers and other intervening circumstances.

II. This Court Should Sanction a Balanced and Pragmatic Approach to Alleged *Edwards* Violations.

This past term, in *Seibert*, the Court looked at a related issue and offered a practical reading of the prophylactic protections attached to the Fifth Amendment. Consistent with its decision in *Seibert*, this Court should adopt a balanced and pragmatic approach to alleged *Edwards* violations in cases such as this one.

In *Seibert*, the plurality recognized that the Court in *Elstad* had held that "a suspect who has responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." 124 S. Ct. at 2610 n.4 (quoting *Elstad*, 470 U.S. at 318). In instances where an unwarned statement precedes a later warned statement, one looks to the circumstances of each to determine whether the second statement was "a new and distinct experience," allowing for its admissibility. *Id.* at 2611-12. According to the plurality, the circumstances in *Elstad* were easily distinguishable from the facts before it and, therefore, the later warned statement was inadmissible. *Id.* at 2611-12.

In a concurring opinion, Justice Kennedy espoused an *Elstad*-type analysis which "reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning." *Id.* at 2614-15. Because the police could have legitimate reasons not to administer *Miranda* warnings, "it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning." *Id.* at 2615. Accordingly, in *Elstad*, the Court had concluded that it would be "an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings . . . so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." 470 U.S. at 309.

In those cases where a two-step interrogation technique was used to deliberately undermine *Miranda*, Justice Kennedy recommended a narrower test than that of the plurality:

> The admissibility of post warning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example,

> a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.

Seibert, 124 S. Ct. at 2616. The analysis offered by Justice Kennedy constitutes the holding of the Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (when the Court decides a case with less than a five-Justice majority, the holding of the Court is the position taken by the member(s) who concurred on the narrowest ground).

An approach similar to that taken in *Seibert* should be applied in the context of an alleged *Edwards* violation. Application of Justice Kennedy's analysis to Blake's case would produce a far different, but entirely equitable, result, one which would provide the prophylactic protection intended by *Miranda* and yet "reflect[] a balanced and pragmatic approach to enforcement of the *Miranda* warning." 124 S. Ct. at 2614-15 (Kennedy, J., concurring).

Even recognizing the constitutional significance of the right to counsel, in the same way that a simple failure to administer *Miranda* warnings was not held to taint a voluntary and informed waiver in *Elstad*, so a simple remark by a patrol officer which elicited no response should not forever taint a subsequent voluntary and informed waiver of the right to counsel. This is especially so when curative measures have been taken to ensure that

Miranda rights, including the right to counsel, are protected and circumstances have changed sufficiently to make the subsequent waiver entirely valid.

Even assuming an impermissible remark by Officer Reese, to ascertain whether Blake initiated communications before knowingly and intelligently waiving his right to counsel, one "must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect." *Elstad*, 470 U.S. at 318. It certainly cannot be the case that Officer Reese's comment forever taints a subsequent waiver.

Until Officer Reese made his remark, the authorities had fully complied with *Miranda*. Immediately after the remark, Detective Johns took curative steps to negate Officer Reese's comment and Blake said nothing. After reading the charging papers, Blake initiated contact with Detective Johns, who reacted by first assuring himself that Blake now wanted to talk with him. Those charging papers, which included reference to the possible punishment for first degree murder and Tolbert's assigning all blame to Blake, were entirely new circumstances. Officer Reese played no role in any subsequent questioning. Detective Johns readvised Blake of his *Miranda* rights, and Blake agreed that he had initially requested counsel but had now changed his mind. These circumstances do not equate to police "badgering a defendant into waiving his previously asserted *Miranda* rights," conduct that *Edwards* was "designed to prevent." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). Rather,

Blake initiated further discussions with the police and his subsequent statements were not in violation of *Edwards*.

III. Lower Courts Are Inconsistent in Analyzing the Impact of an *Edwards* Violation.

There is inconsistency among the lower courts in analyzing the impact of an *Edwards* violation. Reflective of this inconsistency and in direct contrast to the application of *Edwards* and *Bradshaw* by the Court of Appeals of Maryland is *State v. Plch*, 826 A.2d 534 (N.H.), *cert. denied*, 124 S. Ct. 546 (2003). In *Plch*, the New Hampshire Supreme Court addressed a somewhat factually similar circumstance to that of *Blake* with a far different result.[5] After Plch informed the police that he wanted a lawyer, one of the detectives attempted to encourage Plch to continue talking with them. *Id.* at 538-39. Plch was then left alone in a room for approximately 20 minutes, after which the detective returned and informed Plch of the charges he was facing and, in response to Plch's question whether he would get a life sentence, the fact that a sentence could be a severe one. *Id.* at 539. Forty minutes later, Plch was taken to a booking room where he indicated that he wanted to talk and began making incriminating statements. *Id.* Plch was given his *Miranda* rights a second time and waived them.

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[5] The court first addressed the claim under the state constitution but cited United States Supreme Court opinions for guidance. 826 A.2d at 539. The court then stated that the same result obtained under the federal constitution. *Id.* at 545.

Id.

The New Hampshire Supreme Court concluded that the police violated Plch's right to counsel when, after Plch invoked that right, they continued to use language intended to pressure him to change his mind. *Id.* at 540-41. This language included encouragement to Plch "to stand up and be the man you want to be and let us know where the body parts are so that family can rest." *Id.* at 538. However, according to the court, the analysis did not end there. *Id.* at 541. Rather, pursuant to *Edwards*, the court had to consider whether Plch later initiated further discussions without any improper prompting. *Id.* Stated otherwise, in order for there to be a constitutional violation, "the police must not only engage in improper prompting, that prompting must also be the cause of the defendant's initiation of further discussions with the police." *Id.* at 542. The court held that Plch's request to continue discussions, occurring one and a half hours after the officer's improper comments, was initiation on Plch's part, and not the result of earlier prompting, allowing for the admissibility of his subsequent statements. *Id.* at 542.

This application of *Edwards* and *Bradshaw* makes far more sense than that employed by the Maryland court. The New Hampshire court employed an analysis requiring a direct link between an improper remark and a subsequent waiver in order to find that waiver invalid. In other words, it allowed for circumstances to change sufficiently to allow a suspect to initiate communications, despite a prior illegality.

Although the New Hampshire court did not refer specifically to *Elstad*, its analysis recognized that a violation of *Edwards*, like a *Miranda* violation, does not forever preclude a suspect from initiating contact with the police and validly waiving the right to counsel, irrespective of the prior illegality. In lower state and federal courts, however, there is a divergence of opinion as to whether an *Elstad*-type analysis is appropriate when the police have violated a suspect's invoked right to counsel and then subsequently obtained an uncoerced statement after waiver of the right.

Some courts hold that, because *Edwards* is a prophylactic measure, an *Elstad* analysis should be applied. *See Correll v. Thompson*, 63 F.3d 1279, 1289-90 (4th Cir. 1995) (when earlier confession violates *Edwards*, *Elstad* analysis applies to later confession), *cert. denied*, 516 U.S. 1035 (1996); *Collazo v. Estelle*, 940 F.2d 411, 421 (9th Cir. 1991) (recognizing that one looks at totality of circumstances in determining whether prior *Edwards* violation necessarily negates later initiation of questioning by suspect and waiver of previously invoked right to counsel), *cert. denied*, 502 U.S. 1031 (1992); *Dunkins v. Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988) (circumstances such as break in custody can dissolve *Edwards* claim), *cert. denied*, 489 U.S. 1059 (1989); *McFadden v. Garraghty*, 820 F.2d 654, 660 (4th Cir. 1987) (recognizing that one should employ *Elstad* type of analysis in determining whether an *Edwards* violation taints a subsequent statement by a suspect); *State v. Nash*, 718 So.2d 269, 270 (Fla. App. 1998) (*Elstad* analysis applies to violation of *Edwards* prophylactic rule); *People*

v. Bradford, 929 P.2d 544, 565-66 (Cal.) (pursuant to *Elstad*, violation of *Edwards* does not necessarily taint later waiver of right to counsel), *cert. denied*, 522 U.S. 953 (1997); *People v. Winsett*, 606 N.E.2d 1186, 1199-1201 (Ill. 1992) (police failure initially to honor invocation of right to counsel is violation of prophylactic rule, not constitutional violation, and, therefore, does not require suppression of fruits of later confession), *cert. denied*, 510 U.S. 831 (1993).

Other courts view a violation of *Edwards* as a constitutional violation which negates application of an *Elstad* analysis. *See State v. Crump*, 834 S.W.2d 265, 270 (Tenn.) (*Elstad* analysis inapplicable after suspect invokes right to counsel or right to silence), *cert. denied*, 506 U.S. 905 (1992); *State v. Hartley*, 511 A.2d 80, 90-91 (N.J. 1986) (same).

Because inconsistency in analyzing the impact of an *Edwards* violation exists in the lower courts, this Court's guidance is sorely needed. The absence of guidance has resulted in a decision by the Maryland court that is plainly wrong.

IV. Public Policy Concerns Require This Court To Reject the Maryland Court's Application of *Edwards*.

In this case, the authorities responsible for the investigation of the murder of Straughan Lee Griffin did everything in their power to protect Blake's rights. The police officers conducting the search at his house were reminded not to speak with Blake if he happened to be at

home. Detective Johns promptly ceased questioning Blake once Blake indicated he wanted an attorney. Detective Johns properly provided Blake with a copy of the charging papers and suggested that Blake read them carefully. Detective Johns took immediate action upon Officer Reese's unexpected comment to ensure that Blake's invocation of his right to counsel was fully respected.

The overwhelming conclusion, based on the totality of the circumstances, is that Blake initiated further discussions with the police. Blake changed his mind about talking to the police when he realized the seriousness of his predicament. Officer Reese's offhand remark should not result in the draconian solution found by the Court of Appeals of Maryland. "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic." *Michigan v. Tucker*, 417 U.S. 433, 446 (1974). To repeat Justice Scalia's prescient statement in *Minnick*: "The procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free." 498 U.S. at 166 (Scalia, J., dissenting).

Likewise in the instant case, the State should not be deprived of critical evidence, or the right to proceed to trial, because of the brief remark of a patrol officer who walked back to the cell when Detective Johns was bringing Blake the charging document, which remark was immediately dismissed by the detective in Blake's

presence. To hold as the Court of Appeals of Maryland did does not advance the raison d'etre for *Edwards, i.e.,* preventing government officials from "badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick*, 498 U.S. at 151.

In sum, in spite of Officer Reese's remark, the totality of the circumstances in this case indicate that Blake understood that the police would not talk to him after he invoked his *Miranda* rights, initiated contact with the police after reading the charging papers, and then voluntarily and knowingly waived his *Miranda* rights.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

KATHRYN GRILL GRAEFF*
ANNABELLE L. LISIC
Assistant Attorneys General

Counsel for Petitioner

**Counsel of Record*
September 13, 2004

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APPENDIX A

Court of Appeals of Maryland.

Leeander Jerome BLAKE
v.
STATE of Maryland.

No. 81, Sept. Term, 2003.

May 12, 2004.
Reconsideration Denied June 16, 2004.

Background: State appealed from order of the Circuit Court, Anne Arundel County, North, J., granting defendant's suppression motion. The Court of Special Appeals reversed, and defendant petitioned for writ of certiorari.

Holding: The Court of Appeals, Raker, J., held that officer's remark to defendant stating "I bet you want to talk now, huh" after defendant unequivocally invoked his right to counsel under *Miranda* and detective gave defendant charging document listing the penalty to which defendant was subjected as "death" amounted to the functional equivalent of interrogation.

Reversed and remanded with instructions.

Argued before BELL, C.J., RAKER, WILNER, CATHELL, HARRELL, BATTAGLIA, JOHN C. ELDRIDGE (Retired, specially assigned), JJ.

This case is an interlocutory appeal filed by the State[6] from an Order in the Circuit Court for Anne Arundel County granting Leeander Jerome Blake's motion to suppress his incriminating statements on the grounds that the police elicited his statements in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Court of Special Appeals disagreed with the Circuit Court, and in an unreported opinion, reversed. This Court granted Blake's petition for writ of certiorari to consider the single question of whether the police actions in question constituted the functional equivalent of interrogation following petitioner's invocation of his *Miranda* rights, thereby violating petitioner's right against compelled self-incrimination. *Blake v. State,* 378 Md. 176, 835 A.2d 1103 (2003). We shall hold that the police actions

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[6] Pursuant to Maryland Code (1973, 2002 Repl.Vol., 2003 Cum.Supp.) § 12-302(c)(3)(i) of the Courts and Judicial Proceedings Article, the State may appeal in the following circumstances:

> "In a case involving a crime of violence as defined in § 14-101 of the Criminal Law Article, and in cases under §§ 5-602 through 5-609 and §§ 5-612 through 5-614 of the Criminal Law Article, the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Constitution of Maryland, or the Maryland Declaration of Rights."

constituted the functional equivalent of interrogation, thereby violating petitioner's rights, and, under the circumstances presented herein, the trial court properly suppressed petitioner's statements.

I.

Petitioner was indicted by the Grand Jury for Anne Arundel County for the offenses of first degree murder, second degree murder, and manslaughter, in violation of former Maryland Code (1957, 1996 Repl.Vol., 2001 Cum.Supp.), Article 27 § 407, § 411, and § 387.[7] Straughan Lee Griffin, a resident of Annapolis, was shot and killed in front of his home on September 19, 2002. His assailant[s] shot him in the head, stole his automobile, and ran over his body as they fled from the scene.

Petitioner filed an omnibus pre-trial motion to suppress all evidence seized by the State. We focus here on his motion to suppress his incriminating statements. The Circuit Court held an evidentiary hearing and granted the motion to suppress. We set forth the facts as developed at the suppression hearing.

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[7] Article 27 of Maryland Code (1957, 1996 Repl.Vol., 2001 Cum.Supp.), which was in effect when the events here occurred, has since been repealed and recodified. The provisions relating to first degree murder, second degree murder, and manslaughter are now found in Maryland Code (2002, 2003 Cum.Supp.) § 2-201, § 2-204, and § 2-207 of the Criminal Law Article.

On October 25, 2002, Terrence Tolbert was arrested in connection with the murder of Straughan Lee Griffin. Tolbert implicated petitioner in the crime. Between 4:30 and 5:00 a.m. on the following day, the Anne Arundel County police arrested petitioner at his home. Petitioner was wearing boxer shorts and a tank top and no shoes. He was handcuffed and transported by uniformed officers to the Annapolis Police Department.

The police took petitioner to a room identified as an "intake room" or "booking room." Detective William Johns, the lead detective, advised petitioner of his rights pursuant to *Miranda v. Arizona.* Petitioner invoked his right to counsel, indicating he did not wish to speak with the police officers without an attorney, and after signing the police advice of rights form, he then was placed in a holding cell at approximately 5:25 a.m.

At 6:00 a.m., Detective Johns, accompanied by uniformed Officer Curtis Reese, went to petitioner's cell and gave him a copy of the arrest warrant and statement of charges.[8] Detective Johns explained the charges to

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[8] Md. Rule 4-212(e) requires that a defendant be served with a copy of the statement of charges. The Rule provides, in pertinent part:

> "[A] warrant shall be executed by the arrest of the defendant. Unless the warrant and charging document are served at the time of the arrest, the officer shall inform the defendant of the nature of the offense charged and of the fact that a warrant has been issued. A copy of the warrant and charging document shall be served on the defendant promptly after the arrest."

petitioner and told him that they were serious charges, and that he needed to read the document carefully and make sure he understood it.

The statement of charges that Detective Johns gave to petitioner was a District Court of Maryland computer print-out listing the charges. The statement of charges indicated that petitioner was charged with first degree murder, second degree murder, armed robbery, armed carjacking, and use of a handgun in a crime of violence. The penalty stated on the document for the offense of first degree murder was, in all capital letters, "DEATH." Petitioner's date of birth, reflected on the statement of charges, was June 1, 1985; he was seventeen years of age. As a person under the age of eighteen years at the time of the offense, petitioner was not eligible for the death penalty. *See* Md.Code (2002, 2003 Cum.Supp.) § 2-202(b)(2)(i) (to be death eligible in Maryland, a person must be eighteen years of age or older).

Detective Johns testified that after he handed petitioner the charging document and turned to leave, Officer Reese, apparently having followed Detective Johns to the cell block area, appeared and said, in a tone Detective Johns characterized as loud and confrontational, "I bet you want to talk now, huh!" Detective Johns said that he was surprised by Officer Reese's statement, that it was unexpected, and that Detective Johns said, very loudly

within petitioner's hearing, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Detective Johns testified that he was concerned that "Officer Reese's outburst would violate Mr. Blake's request for counsel prior to being questioned" and, as a result, he told Officer Reese that petitioner had asked for an attorney and they could not reinitiate any kind of conversation with him.

Petitioner remained in the cell block, wearing only his boxer shorts and t-shirt. Approximately one-half hour after the earlier contact, Detective Johns went back to petitioner's cell to give petitioner his clothing which had been brought to the station by another police officer. Detective Johns opened the exterior door, walked in front of petitioner's cell, and handed him the clothing. Petitioner then said, "I can still talk to you?" Detective Johns responded: "Are you saying that you want to talk to me now?" Petitioner responded "yes." Detective Johns left the cell area and returned after a few minutes. He told petitioner that he would have to read him his rights again and that he would be back in a few minutes. Petitioner then was taken back to the intake room, was re-advised of his *Miranda* rights, which he waived, and agreed to provide a statement in the absence of an attorney.

Petitioner made certain incriminating statements to Detective Johns as he explained his involvement in the events of September 19, 2002. Detective Johns asked him if he would be willing to take a polygraph exam and petitioner agreed. He was transported to Maryland State Police Barracks J in Annapolis, where Corporal Lloyd E.

White again advised petitioner of his *Miranda* rights. After the test was administered, petitioner made further statements.

Petitioner testified at the hearing on the motion to suppress. He testified that he was at home watching television in the early morning hours of October 26, 2002, when he was arrested at approximately 4:30 a.m. Wearing only a tank top, boxer shorts, and no shoes, he was handcuffed and taken outside, where it was cold and wet, and transported to the police station. He was placed in a room and was told by an officer that Terrence Tolbert had identified him as the shooter of Mr. Griffin. He said he wanted a lawyer and was placed in a cell. He said that when Detective Johns and Officer Reese gave him a copy of his charges and Officer Reese made the statement to him, he had just seen that he was facing the death penalty and he was scared. The two officers left, Detective Johns brought him his clothing and then left, and then Detective Johns returned. Petitioner's description of what ensued next differed from that of Detective Johns.[9] Petitioner's version is that the detective initiated the conversation again, stating: "Mr. Blake, do you wish to still talk to me?" In response, petitioner said, "May I still talk to you?" The detective allegedly responded, "Yes." Petitioner denied first asking Detective Johns if he could talk to him.

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[9] The hearing judge accepted Detective Johns's version of events regarding who spoke first after Detective Johns returned.

In response to a question asking petitioner what caused him to speak to Detective Johns after he had invoked his *Miranda* rights, petitioner stated:

> "First, it was what Officer Reese said to me, 'I bet you want to talk now, huh!' I was scared, cold. Never went through nothing like this. And I saw my charges and I saw I was facing death."

The Circuit Court granted petitioner's motion to suppress his statements. Judge Pamela North began by noting that petitioner had invoked his right to counsel and that pursuant to *Miranda,* no further interrogation could ensue. Judge North found the following:

> "The Defendant was still in underwear with no shoes on. During this time, the Defendant made no statements and asked no questions. There was, as of this point, no indication the Defendant would change his mind.
>
> At approximately 6:00 a.m., Detective Johns and Officer Reese, and Officer Reese, by the way, was the same officer who had previously transported the Defendant to the Annapolis Police Department. They both walked back to his cell. As in *Edwards,* Defendant did not request or suggest that the officers should come back to his cell. Defendant was awake. Johns took the statement of charges back to the Defendant, handed them to him, and read the charges to him. Johns testified, and this is a quote, "I said to him, they are serious charges. He needs to read it carefully and make sure he understood it."

> As Johns turned to walk out, Reese said, in a confrontational loud voice, "I bet you want to talk now, huh!" Johns testified he was surprised by this.
>
> * * *
>
> [Detective Johns] also erroneously served him with a document which stated that the penalty for count one murder was death. The word death being written in all capital letters. Defendant was, in fact, not eligible for the death penalty. This was either done intentionally or by mistake.... No matter who was responsible for death being typed in capital letters on the penalty section for murder, it was still State action.
>
> So the next question is was there interrogation? Was there a statement made by the police which the police knew or should have known would be reasonably likely to elicit an incriminating response? That answer has to be yes.
>
> * * *
>
> I believe the State's argument misses the mark when it focuses on what Johns intended or did not intend. Reese is also a police officer. He constitutes State action. And he clearly intended that the Defendant make a statement.
>
> * * *
>
> So the question is how do we know what Reese intended. Well, let's analyze the remark he made.

Defendant is handed a statement of charges indicating to him, a seventeen-year-old, indicating to him for the first time that he is being charged with murder and he can get the death penalty.

Reese's statement was, "I bet you want to talk now, huh!" This is not a vague appeal to Defendant's conscience like the remarks were in *Brewer versus Williams*. First, the statement, itself, suggests he should want to talk. And the word, "now," that is, "I bet you want to talk now" clearly refers Defendant to what has just been handed to him. In other words, look at those charges, look at that penalty, and I'll bet you will want to talk.

* * *

It is a statement made specifically for the purpose of getting Mr. Blake to talk. In fact, Mr. Blake's question is in direct response to Reese's previous statement. The police left the cellblock area immediately after Reese made that statement. So, until 6:28 when they came back there had been no opportunity for the Defendant to ask if he could talk to them. Since twenty-eight minutes had passed, he asked, "I can still talk to you?" Even though that period of time had passed.

Is there any possible interpretation of that statement that it is, as the State has urged the Court to find, simply an innocent offhanded comment not meant or expected to elicit an incriminating response? I don't think so. Examples of innocent offhanded comments not likely to elicit an incriminating response would be, quote, "Here are

some clothing for you." Or, "Please move away from the door so I can unlock it." Or, "Do you need a drink of water?"

United States v. Walker instructs courts to look at the context in which the statement is made. Once again, the context is the statement was made to a seventeen-year-old with no *Miranda* or interrogation experience, who was still in a chilly cell in his underwear with no shoes on, without a parent present or available, just as he is being handed papers advising him he is charged with murder and can get death.... That statement, under these circumstances, was enough to make an adult repeat offender squirm, not alone a seventeen-year-old.

* * *

Here, Defendant is still in custody, still at the Annapolis police department. Only twenty-eight minutes has gone by since the illegal interrogation. Enough time for him to read the charging document and only one hour and seventeen minutes since he invoked his right to counsel.

He is still seventeen years old. Still undressed. Still in a cold cell, where he is facing death. And an officer had made a case for him to speak now through that officer's coercive statement.

He has no parent present. The Defendant testified that he was scared and cold and thought he was facing death.

* * *

Once Defendant made certain incriminating statements, he was then asked by Detective Johns if he wanted to take a polygraph. This is all one continuous stream of events. There was no break in time or place here. No attenuation.

* * *

The polygraph process began at about 8:30 or 9:00 o'clock with Defendant's mother present at the Maryland State Police Barracks. She signed a consent form but never saw or spoke to the Defendant. We now have a change of location and the re-Mirandaizing of the Defendant.

However, this is all one continuous course of conduct beginning with Officer Reese's statement and other coercive circumstances. Defendant had, as some cases talk about, already let the cat out of the bag. It is unlikely that an honest seventeen-year-old who is respectful of authority would realize he could turn back now.

There was no lengthy period of time as we see in some cases to break the chain of events and to prove attenuation. In any event, viewing the evidence under the totality of the circumstances, the Defendant did invoke his right to counsel.

He was thereafter interrogated by police in violation of *Miranda* and *Edwards*. The State must prove his subsequent *pro forma* waiver was not the result of the previous coercive unlawful police conduct. And they have not met that heavy burden."

The trial court held that Officer Reese's statement was interrogation and that it violated *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The court granted Blake's motion to suppress as to any and all statements he made at the Annapolis police department and at the Maryland State Police Barracks.

The State noted a timely appeal to the Court of Special Appeals. A divided intermediate appellate court, in an unreported opinion, Bloom, J., dissenting, reversed the judgment. We granted petitioner's writ of certiorari to answer the following question: "Did the police actions in question constitute the functional equivalent of interrogation?" 378 Md. 176, 835 A.2d 1103.

II.

There is no dispute in this case that petitioner was in custody and had invoked his right to counsel. The first question is whether the statement of Officer Reese constituted "police-initiated custodial interrogation" in contravention of *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Petitioner argues that Officer Reese's comment, made in conjunction with Detective Johns's passing to petitioner a copy of the statement of charges which incorrectly informed him he was facing the death penalty, was the functional equivalent of interrogation. He maintains that the comment was made specifically for the purpose of

getting petitioner to talk and the officer knew or should have known that, under the circumstances, the comment was likely to elicit an incriminating response. Petitioner argues that his subsequent statements were suppressed properly because they were a product of the unlawful police-initiated interrogation which violated *Edwards*.

The State's argument is that Officer Reese's remark to petitioner was not interrogation--that petitioner initiated contact with the police after he read the charging documents and then voluntarily waived his *Miranda* rights before making incriminating statements. The State contends that Officer Reese's remark was not the functional equivalent of interrogation--that it was nothing more than a comment on the seriousness of the charges and, in a sense, a rhetorical question. Even if Officer Reese's remark is viewed as interrogatory or as an invitation to talk, the State maintains that Detective Johns removed any alleged taint from the remark when he admonished Officer Reese immediately that they could not talk to petitioner because he had invoked his right to counsel.

III.

Our review of the trial court's ruling on a motion to suppress evidence is limited to the record developed at the suppression hearing. *See White v. State,* 374 Md. 232, 249, 821 A.2d 459, 469 (2003). We accept the facts as found by the motions judge unless they are clearly erroneous. *Id.* The evidence is to be viewed in the light most favorable to the prevailing party. *See State v. Rucker,* 374 Md. 199, 207, 821 A.2d 439, 444 (2003). We "undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case." *See White,* 374 Md. at 249, 821 A.2d at 469.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), dictates that when a suspect is taken into custody, the person is entitled to certain procedural safeguards before law enforcement officers may interrogate that person. Those rights include the right to consult with an attorney. *Id.* at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706-07. Once a suspect asks to speak with an attorney, that person may not be interrogated further until either counsel has been made available or until the suspect validly waives the earlier request for an attorney. *Id.* at 444-45, 86 S.Ct. at 1612, 16 L.Ed.2d at 707. *See Edwards,* 451 U.S. at 484-85, 101 S.Ct. at 1885, 68 L.Ed.2d at 386; *Radovsky v. State,* 296 Md. 386, 392-93, 464 A.2d 239, 242-43 (1983) (noting *per se* rule precluding police-initiated interrogation after an arrestee has expressed a desire for the assistance of counsel); *Bryant v. State,* 49 Md.App. 272, 279, 431 A.2d 714, 718 (1981) (stating that "even at the expense of redundancy ... *Miranda* and *Edwards* mean exactly what they say: once the accused requests the presence of counsel at a custodial interrogation, the Fifth Amendment to the Constitution of the United States of America and Article 22 of the Maryland Declaration of Rights are *ipso facto* invoked, and *all questioning must cease*").

Under the rule developed in *Edwards,* "an accused ...

having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-85, 101 S.Ct. at 1885, 68 L.Ed.2d at 386. The Supreme Court held that once a suspect has invoked his right to counsel, the police may not make a subsequent attempt to elicit a waiver and then a statement by re-advising him of his *Miranda* rights. A constitutionally valid statement may be obtained by the police in two ways: if the suspect initiates further conversation with the police or if an attorney has been made available to the suspect. *See Smith v. Illinois,* 469 U.S. 91, 94-95, 105 S.Ct. 490, 492-93, 83 L.Ed.2d 488, 493-94 (1984). Following a suspect's request for counsel, a valid waiver of that right cannot be established by showing only that the accused responded to further police-initiated interrogation. *Edwards,* 451 U.S. at 484, 101 S.Ct. at 1884-85, 68 L.Ed.2d at 386. *See Radovsky,* 296 Md. at 398-99, 464 A.2d at 246 (holding that after Radovsky had invoked his right to counsel, the police improperly initiated custodial interrogation in violation of *Edwards*). The burden is on the State to prove that, after invoking his or her right to counsel, the accused initiated further discussion with the police. *See State v. Munson,* 594 N.W.2d 128, 141 (Minn.1999) (holding that "the state has the burden of proving that, after invoking his right to counsel, [defendant] initiated further discussion with the police"). If we find that petitioner did not initiate further discussions with the police, following *Edwards,* we do not consider whether he subsequently waived his right to

counsel.[10] *See Oregon v. Bradshaw,* 462 U.S. 1039, 1046, 103 S.Ct. 2830, 2835, 77 L.Ed.2d 405, 413 (1983) (stating that "[s]ince there was no violation of the *Edwards* rule in this case, the next inquiry was 'whether a valid waiver of

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[10] Some courts have held that a defendant's statements are inadmissible once the police have initiated contact with the defendant in violation of *Edwards,* rendering it unnecessary to inquire whether the defendant validly waived his or her *Miranda* rights. *See, e.g., State v. Munson,* 594 N.W.2d 128, 140 (Minn.1999) (holding that, where officers resumed interrogation before the suspect initiated further conversation, suspect's statements must be excluded and the court need not reach the question of whether suspect's subsequent waiver was voluntary). The Supreme Court has suggested the same. In *Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the Court stated, "*[s]ince there was no violation of the* Edwards *rule in this case,* the next inquiry was 'whether a valid waiver of the right to counsel and the right to silence had occurred." *Id.* at 1046, 103 S.Ct. at 2835, 77 L.Ed.2d at 413 (emphasis added). Implicit in this statement is the notion that courts do not engage in a waiver inquiry when it is the police, rather than the suspect, who "initiate" contact. *See also Michigan v. Jackson,* 475 U.S. 625, 636, 106 S.Ct. 1404, 1411, 89 L.Ed.2d 631, 642 (1986) (applying *Edwards* rule to a claimed violation of defendant's Sixth Amendment right to counsel and holding that "if police initiate interrogation after a defendant's assertion ... of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid").

the right to counsel and the right to silence had occurred"); *Radovsky,* 296 Md. at 392, 464 A.2d at 242 (holding that "the defendant's right to have counsel during interrogation was violated, under the principles of *Edwards* and *Miranda,* and thus all evidence obtained from Radovsky subsequent to his request for counsel should have been suppressed").

Interrogation means more than direct, explicit questioning and includes the functional equivalent of interrogation. *See Drury v. State,* 368 Md. 331, 793 A.2d 567 (2002). The Supreme Court, in *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), set out the test for establishing when a suspect, who is in custody and has invoked the right to counsel but does not yet have the assistance of counsel, has been subjected to "interrogation." The Court stated:

> "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its *functional equivalent.* That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Id. at 300-01, 100 S.Ct. at 1689-90, 64 L.Ed.2d at 307-08 (emphasis added) (footnotes omitted).

Although the test of whether the police should know

their words or actions are reasonably likely to elicit an incriminating response is an objective one, the intent of the police is not irrelevant. *Id.* at 301-02 n. 7, 100 S.Ct. at 1690 n. 7, 64 L.Ed.2d at 308 n. 7. If a police officer acts with a purpose of getting a suspect to talk, it follows that the officer has reason to know that his or her conduct was reasonably likely to elicit an incriminating response. *Id.* at 302 n. 7, 100 S.Ct. at 1690 n. 7, 64 L.Ed.2d at 308 n. 7. We focus on the defendant's perspective rather than on the police officer's intent. *See Arizona v. Mauro,* 481 U.S. 520, 528, 107 S.Ct. 1931, 1936, 95 L.Ed.2d 458, 467 (1987).

"Interrogation," as used in *Miranda,* has been further explicated in *Innis,* as follows:

> "[T]he term 'interrogation' ... refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the

unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."

Innis, 446 U.S. at 301-02, 100 S.Ct. at 1689-90, 64 L.Ed.2d at 308 (citations omitted).

The State maintains that petitioner's rights under *Miranda* and *Edwards* were not violated because the police were presenting petitioner merely with the charging document, a duty they were mandated to perform under Maryland law. The State characterizes Officer Reese's comment as nothing more than a comment on the seriousness of the charges and as a rhetorical question, concluding that his comment does not constitute interrogation. The answer to this argument depends upon the answer to the question as to whether, under *Innis,* the police officers engaged in activities which they should have known were reasonably likely to elicit an incriminating response. No one disputes here that once petitioner invoked his *Miranda* rights, there was no express questioning.

The Circuit Court found that the comment of Officer Reese amounted to the functional equivalent of interrogation. We agree.

Petitioner clearly and unequivocally invoked his right to counsel under *Miranda.* Thereafter, within a very short period of time, Detective Johns gave petitioner the

charging document listing the penalty to which petitioner was subjected as "DEATH." Officer Reese initiated communication with petitioner when he said to him, "I bet you want to talk now, huh!" Whether the remark made by Officer Reese was the functional equivalent of interrogation depends in part on whether the officer's comment was directed towards petitioner and was reasonably likely to elicit a response.

It is undisputed that Officer Reese's comment was directed towards petitioner. The remaining question is whether the comment was reasonably likely to elicit a response. Officer Reese made his comment to petitioner when Detective Johns gave petitioner the charging document advising him that he was subject to the death penalty; any reasonable officer had to know that his comment was reasonably likely to elicit an incriminating response. When the charging document was given to petitioner, containing a false statement of the law with respect to the penalty of death, it was accompanied by an officer's statement which served no legitimate purpose other than to encourage petitioner to speak. Detective Johns's reaction supports this conclusion. *See United States v. Cooper,* 19 F.3d 1154, 1162 (7th Cir.1994) (stating that "[w]here an objective observer would believe that the encounter was reasonably likely to elicit an incriminating response from the defendant, the court will find that the encounter constituted the 'functional equivalent' of interrogation," citing *Innis,* 446 U.S. at 301, 100 S.Ct. at 1689, 64 L.Ed.2d at 308).

We reject the State's characterization offered at oral

argument that the officer's statement was merely a rhetorical question. The officer's statement to petitioner could only be interpreted as designed to induce petitioner to talk and it was improper. This statement was the functional equivalent of interrogation, and it was custodial interrogation. Actions taken by the police that the police should know are reasonably likely to elicit an incriminating response from a suspect amount to the functional equivalent of interrogation.

Merely presenting an accused with a charging document, without more, is not the functional equivalent of interrogation. In Maryland, when a defendant is arrested without a warrant, a copy of the charging document must be served on the defendant promptly after it is filed. Md. Rule 4-212(f). *See White,* 374 Md. at 250-51, 821 A.2d at 469-70; *State v. Conover,* 312 Md. 33, 42, 537 A.2d 1167, 1171 (1988). In the instant case, the officers' conduct does not fall into the category of fulfilling a legal duty and merely serving a charging document upon a defendant. Instead, we have an interrogatory type statement by an officer concomitant with the serving of a document containing the most egregious misstatement as to the penalty for the offense.

The State argues that even if Officer Reese's statement was interrogation, the detective told petitioner that they could not talk to him, and it was petitioner who reinitiated interrogation, and then knowingly and intelligently waived his *Miranda* rights. The State maintains that if the suspect reinitiates contact with the police, and then waives his rights, police questioning may then commence.

Relying on *Oregon v. Bradshaw,* 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), the State argues that petitioner's question, "Can I still talk to you?", is strong evidence that petitioner initiated the further contact with the police. The State points out that Blake reinitiated contact with the police only after reading the charges, the evidence to support those charges, and specifically, after reading what Terrence Tolbert had to say.

The law is clear that a suspect may validly waive *Miranda* rights, but once the right to counsel has been invoked, additional safeguards are necessary. The Supreme Court pointed out in *Edwards* as follows:

> "[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that *an accused, such as [the defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.*"

451 U.S. at 484-85, 101 S.Ct. at 1884-85, 68 L.Ed.2d at 386 (emphasis added) (footnote omitted). In *Bradshaw,* the Court found that the accused in fact initiated the conversation and that there was no violation of the *Edwards* rule. 462 U.S. at 1045-46, 103 S.Ct. at 2835, 77

L.Ed.2d at 412- 13. In assessing whether the accused initiated the interrogation, the Court observed that the accused's question, "Well, what is going to happen to me now?", although ambiguous, was, "in the ordinary dictionary sense of that word," initiation. *Id.* at 1045, 103 S.Ct. at 2835, 77 L.Ed.2d at 412. Nonetheless, the Court stated:

> "While we doubt that it would be desirable to build a superstructure of legal refinements around the word 'initiate' in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to 'initiate' any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*.

Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation. That the police officer so understood it is apparent from

> the fact that he immediately reminded the accused that "[y]ou do not have to talk to me," and only after the accused told him that he "understood' did they have a generalized conversation. On these facts we believe that there was not a violation of the *Edwards* rule."

Id. at 1045-46, 103 S.Ct. at 2835, 77 L.Ed.2d at 412-13 (citation omitted). One court concluded that "initiation" by a defendant "occurs when the defendant evinces 'a willingness and a desire for a generalized discussion about the investigation.' " *Holman v. Kemna,* 212 F.3d 413, 417 (8th Cir.2000) (quoting *Bradshaw,* 462 U.S. at 1045-46, 103 S.Ct. at 2835, 77 L.Ed.2d at 412).

In finding that petitioner's question was "in direct response to" Officer Reese's coercive statement, Judge North found that the police reinitiated the contact. The court also found that petitioner "initiated a conversation with [Detective] Johns after he [was] interrogated without counsel twenty-eight minutes earlier." Whether the ultimate issue of "initiation" under *Edwards* is a factual issue requiring a deferential standard of review, *see United States v. Gomez,* 927 F.2d 1530, 1539 n. 9 (11th Cir.1991) (stating that the finding of "initiation" under *Edwards* is considered a factual issue, citing *Fike v. James,* 833 F.2d 1503 (11th Cir.1987)), or a question of law requiring *de novo* review, *see Holman,* 212 F.3d at 417 (holding that issue is legal one requiring *de novo* review, citing *Bannister v. Delo,* 100 F.3d 610, 620 n. 9 (8th Cir.1996); *United States v. Whaley* 13 F.3d 963, 968 (6th Cir.1994)), under either standard of review, we agree with the conclusion of the Circuit Court.

We agree with Judge North that petitioner did not initiate further contact with the police and that the police violated the *Edwards* rule. Although petitioner's question to Detective Johns, "I can still talk to you?" might be considered an "initiation" of contact with the officers in the "dictionary sense" of the word as used in *Bradshaw,* it could hardly be said that, under the circumstances, petitioner initiated the contact as that term is contemplated in the legal sense. Petitioner had requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected. There was no break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive interrogation. *See Dunkins v. Thigpen,* 854 F.2d 394, 397 (11th Cir.1988) (holding that break in custody after invocation of Fifth Amendment rights ends the need for the *Edwards* rule); *United States v. Walker,* 624 F.Supp. 103, 105 (D.Md.1985) (holding that following defendant's invocation of his *Miranda* rights, delay of approximately one hour not sufficient to constitute waiver of right to have counsel present before he made any statement).

We reject the State's argument that, even if Officer Reese interrogated petitioner in violation of *Miranda* and *Edwards,* Detective Johns somehow cured the violation by declaring in a loud voice: "No, he doesn't want to talk to

us. He already asked for a lawyer. We cannot talk to him now." Judge North's conclusion that Detective Johns's remarks did not negate the prior unlawful interrogation by Officer Reese was not clearly erroneous. The delay of twenty-eight minutes before petitioner asked if he could talk to the officers is insufficient to constitute a waiver of his right to have counsel present before he made any statement. The break in time from Officer Reese's improper interrogation to petitioner's inquiry was very short, indicating that the latter was a continuation of the former.

The record supports the Circuit Court's finding that petitioner's question was in direct response to Officer Reese's unlawful interrogation and was the product of impermissive interrogation. Under these circumstances, we conclude that petitioner did not "initiate" conversation with the police.

The United States Court of Appeals for the Eleventh Circuit, in *United States v. Gomez,* 927 F.2d 1530 (11th Cir.1991), addressed a similar issue. After Gomez had indicated that he wished to speak with his attorney, DEA agents stated that Gomez should consider cooperating with the government because he faced a possible life sentence and a minimum sentence of ten years. When Gomez asked an agent what he was charged with, he received incorrect information that he was charged with possession of ten kilograms of cocaine. Gomez then expressed his desire to cooperate, was re-advised of his *Miranda* rights, and made incriminating statements. The court held that the agents' comments about the possible benefits of cooperating

constituted further interrogation. *Id.* at 1538. The court further noted that, once the police violate *Edwards,* it does not make sense to say that an accused can thereafter "initiate" conversation with the police unless a substantial amount of time has elapsed such that "the coercive effect of the interrogation will have subsided." *Id.* at 1539 n. 8. Although the accused technically may begin a conversation with the police, if this occurs after the police have interrogated the accused in violation of *Edwards,* the voluntariness of such "initiation" is suspect and statements subsequently obtained are inadmissible. *Id.* at 1539. The court noted that "*Edwards* would be rendered meaningless if agents were permitted to continue interrogation after the request for counsel, and then claim that the consequent response by the accused represented initiation and permitted a waiver of the asserted counsel right." *Id.*

We hold that all statements made by petitioner after he invoked his *Miranda* rights are inadmissible and the motion to suppress the statements was properly granted.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AND TO REMAND CASE TO THE CIRCUIT COURT FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH MARYLAND CODE (1973, 2002 REPL. VOL., 2003 CUM. SUPP.) § 12-302(c)(3)(iv) OF THE COURTS AND JUDICIAL PROCEEDINGS ARTICLE. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY ANNE

ARUNDEL COUNTY.

APPENDIX B

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 771

September Term, 2003

STATE OF MARYLAND

V.

LEEANDER BLAKE

Eyler, James R.,
Bloom, Theodore G.
(Ret., specially assigned),
Karwacki, Robert L.
(Ret., specially assigned),

JJ.

Opinion by Eyler, James R., J.,
Dissenting opinion by Bloom, J.

Filed: October 29, 2003

The State appeals from an order entered by the Circuit Court for Anne Arundel County granting a motion to suppress incriminating statements by Leeander Jerome Blake, appellee, on the ground that the statements were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966).[1] We conclude that the circuit court erred and, consequently, shall reverse its ruling.

As a preview, the core facts are (1) appellee, while in custody (2) was advised of his Miranda rights, (3) appellee did not waive those rights and requested counsel, (4) police officers gave appellee a statement of charges, (5) at or about the same time, a police officer made a comment to appellee, (6) approximately 30 minutes later, appellee expressed a willingness to talk to police, (7) appellee was again advised of his Miranda rights, (8) appellee provided incriminating information, (9) appellee agreed to take a lie detector test, (10) appellee was again advised of his Miranda rights, and (11) appellee provided additional incriminating information.

Accepting the hearing court's first level findings of fact, and looking at the facts most favorable to appellee, we

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[1] Miranda requires that a person in custody be advised of the right to remain silent, the right to the presence of an attorney, retained or appointed, and that any statement made may be used as evidence. 384 U.S. at 444. If the warnings are not given, a statement that is the direct product of the violation is not admissible in evidence, even if voluntary in a due process sense. Michigan v. Tucker, 417 U.S. 433, 443 (1974).

shall assume that the contact which resulted in the incriminating statements was, at least in part, in response to the comment by the police officer. The precise question before us, therefore, is whether the comment constituted "interrogation" within the meaning of Miranda and Edwards v. Arizona, 451 U.S. 477 (1981). We answer that question in the negative.

Evidence at Suppression Hearing

On September 19, 2002, Straughan Lee Griffin, a resident of Annapolis, was shot and killed. On October 25, 2002, Terrence Tolbert was arrested and charged in connection with the homicide. On October 26, 2002 at approximately 5:00 a.m., at his home, appellee was arrested and charged in connection with the homicide. Following his arrest, appellee made incriminating statements to the police regarding his participation in the crime.

Appellee moved to suppress the statements on (1) traditional due process and State law grounds and (2) a violation of Miranda and Edwards. On May 9 and 16, 2003, the circuit court held a hearing on appellee's motion to suppress his statements.

At the hearing, the State called Detective William Johns, a detective with the Annapolis Police Department, and the lead investigator. He testified to the following. After appellee was arrested, he was transported to the Annapolis Police Department and Detective Johns, in the presence of Corporal Thomas Hannon, advised appellee of

his rights, pursuant to Miranda. Appellee initialed each section of the advice of rights form as it was explained to him. Appellee invoked his right to counsel, and at approximately 5:25 a.m., appellee was placed in a holding cell.

At 6:00 a.m., Detective Johns, accompanied by Officer Curtis Reese, went to appellee's cell and gave him a copy of the statement of charges and the application for statement of charges. Detective Johns explained the charges, told appellee to read the documents carefully, and turned to walk out. When Detective Johns turned to leave, Officer Reese said something to the effect, "I bet you want to talk now, huh?" Detective Johns stated that not enough time had elapsed for appellee to have read the charges when Officer Reese made the statement. Detective Johns, surprised by the comment, said loudly, so appellee would hear, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now" and walked Officer Reese out of the cell block. Detective Johns then reported what had occurred to his supervisor, Sergeant Greg Kirchner.

When appellee was arrested, he was wearing a T-shirt and boxer type shorts. It was a "little chilly" or "cold" in the cell. Detective Johns knew that someone was bringing clothes for appellee from appellee's house, but he did not know who. At approximately 6:30 a.m., after the clothes had arrived, Detective Johns took the clothes to appellee. As Detective Johns turned to walk out of the cell block, appellee asked if he could talk to him. Detective Johns left the cell area and reported to Sergeant Kirchner and

Corporal Hannon.

At approximately 6:40 a.m., Detective Johns took appellee to an intake room. Once they arrived, Detective Johns asked appellee if he had initially stated that he wished to exercise his rights and had changed his mind. Appellee answered in the affirmative. Detective Johns again reviewed the Miranda warnings, and appellee initialed the advice of rights form. Appellee stated that he wished to speak and gave a statement during which Detective Johns learned that appellee was 17 years old, was in the 11th grade in school, was sober, not on medications, and had two previous contacts with the police department. The contacts were on July 29, 2001 and January 30, 2002. Detective Johns testified that appellee was calm and cooperative during the interview, which took approximately one hour. Appellee was not handcuffed, no weapons were present, and no threats or promises were made to appellee. The parties stipulated at the suppression hearing that appellee's statement contained incriminating information.

After the statement, Detective Johns asked appellee if he was willing to take a polygraph test, and appellee agreed. Detective Johns contacted Corporal Lloyd E. White, Jr., with the Maryland State Police, to conduct the test. Appellee's mother was also notified, and she consented to the test. The test was conducted at the State Police Barracks in Annapolis. Corporal White gave appellee the Miranda warnings again before conducting the test. The parties stipulated that appellee made incriminating statements during the polygraph examination

and thereafter.

Corporal White, called by the State, testified to the following. On October 26, 2002 he met with Detective Johns, appellee, and appellee's mother. Appellee's mother consented to the polygraph test. Corporal White advised appellee of his Miranda rights and then administered a polygraph test. He stated that no threats or promises were made to appellee, and appellee was "very eager" to speak. Corporal White testified that he did not believe certain statements by appellee, and he asked appellee if he could offer any explanation for his disbelief. At that point, appellee provided additional incriminating information about the crime. The process began between 9:15 and 9:25 a.m. and took approximately two and one-half hours.

Mary Ann Costello, a State's witness, testified to the following. At the time of the hearing, she was a juvenile counselor employed by the Department of Juvenile Justice. She was appellee's probation officer from March 1, 2002 until his case was "rescinded" on August 23, 2002. Ms. Costello described appellee as intelligent and polite and stated that he had complied with his probation requirements. Ms. Costello also stated that appellee had a part-time job and was going to school and that he had had other part-time jobs in the past.

Appellee called Officer Reese, who testified to the following. After appellee was arrested, Officer Reese transported him from appellee's home to the police station. At approximately 6:00 a.m., Officer Reese entered appellee's cell block, pursuant to a policy of routinely

checking on prisoners. Appellee stated that he wanted to talk to someone. Detective Johns, who was not at the cell with Officer Reese but was in the area, shouted that appellee had requested an attorney, and Officer Reese left. Officer Reese denied saying anything to appellee.

Appellee's mother, Lawanda Pierce, testified on his behalf and described the details of his arrest.

Appellee testified that, at approximately 4:00 a.m., he was watching cartoons on television when the police officers arrived at his house. He stated that he had slept three hours the previous evening, had been awake thereafter, and this was not unusual for him. When appellee was arrested and taken to the police station, he was wearing a tank top and underwear. At the station, Detective Johns asked appellee if he knew why he was there and he said yes. Appellee had not been given any information about his arrest prior to that time. After asking appellee if he knew why he was there and appellee's response, Detective Johns advised appellee that Mr. Tolbert had identified appellee as the shooter. Appellee testified that he was "scared" and "shaky." Detective Johns advised appellee of his Miranda rights. Appellee stated that he understood them, and he invoked his right to counsel and to remain silent.

Appellee was thereafter placed in a holding cell. Several minutes later, Detective Johns and Officer Reese came in and gave appellee the statement of charges. Appellee stated that he saw the charges, saw that he was facing death, and heard Officer Reese say, "I bet you want

to talk now, huh?" Appellee testified that "I was just scared. I just got my charges and I was just shook." Detective Johns pushed Officer Reese out of the cell block but returned later and asked appellee if he wanted to talk. Appellee asked if he could, and Detective Johns said yes. Appellee denied that any conversation occurred when Detective Johns brought him his clothes, and stated that he received his clothes prior to the time that Detective Johns asked him if he wanted to talk.

Appellee testified that he decided to talk because of Officer Reese's comment and because of the content of the charges. With respect to the latter, appellee testified that he lived close to Mr. Tolbert, was friendly with him, and saw him frequently. Appellee learned from the statement of charges that Mr. Tolbert had advised the police that appellee shot the victim, took the victim's car keys from his pocket, and ran over the victim with the victim's car. Appellee further testified that he felt angry and betrayed, and he wanted the police to know the truth, i.e., that Mr. Tolbert was the one who shot and ran over the victim.

With respect to the polygraph examination, appellee testified that Detective Johns told him taking the test would help him and that later, Corporal White said the same thing.

Appellee explained that his two prior arrests were drug offenses. He was given juvenile citations and released to his parents. He was not given Miranda warnings on either of those occasions. Nevertheless, he had seen Miranda warnings on television, and he understood all of the rights.

Appellee stated that he was without his clothes less than an hour, and he was not cold after he received them.

In rebuttal, Sergeant Kirchner, Corporal Hannon, and Detective Johns testified. Sergeant Kirchner confirmed Detective Johns' testimony with respect to what Detective Johns had reported to him. Corporal Hannon denied that appellee had been told taking a polygraph test would help him. Detective Johns also testified that he did not tell appellee taking a polygraph test would help him, and that, at his first meeting with appellee, he did not say anything about Mr. Tolbert before giving appellee his Miranda rights.

The advisement of rights forms, containing Miranda warnings and appellee's initials, were introduced in evidence. One form was dated October 26, 2002 with a time notation of 5:11 a.m.; another form bears the same date with a time notation of 6:40 a.m.; and the third form bears the same date with a time notation of 9:20 a.m. The first form, in response to the question whether appellee would talk without a lawyer, contains the handwritten "no." The second form, in response to the same question, contains the handwritten "yes."

The statement of charges and application were also introduced into evidence. The application recites that on September 19, 2002 investigation disclosed that the victim had been shot in the head, his vehicle stolen, and that he had been run over with his vehicle. Additionally, on October 25, 2002, Mr. Tolbert, who had been identified as a suspect, was interviewed and admitted to being one of

two persons who had committed the crimes. Mr. Tolbert identified appellee as the other person and advised that appellee was the shooter and the driver. The statement of charges contained columns with the following headings: offense number, charge or citation number, the applicable statute, the penalty, and a description of the charge. The penalty entry is the maximum penalty allowed and is computer generated when a particular charge is entered into the system. At this stage of the proceedings, the penalty entries are not keyed to a particular defendant. The statement of charges contained the following charges and penalties: first degree murder – death; second degree murder – thirty years; armed robbery – twenty years; armed carjacking – thirty years; and use of a handgun – twenty years.

On June 3, 2003, the court granted the motion to suppress.

Circuit Court's Opinion

The State conceded that, after appellee was arrested and brought to the police station, he was in custody. The court, after acknowledging that, found the following. Appellee was immediately given Miranda rights. The court believed Detective Johns and Corporal Hannon, who testified that they did not advise appellee, prior to giving Miranda warnings, that Mr. Tolbert had accused appellee of being the shooter. The court found that appellee requested counsel and was taken to a cell at 5:25 a.m.

At approximately 6:00 a.m., Detective Johns and Officer

Reese went to appellee's cell. Detective Johns gave appellee the statement of charges, read them to him, and advised him that they were serious charges, he should read them carefully, and make sure he understood them. As Detective Johns turned to walk out, Officer Reese, in a confrontational loud voice, said "I bet you want to talk now, huh?" The court resolved the credibility issue in favor of Detective Johns and appellee and against Officer Reese with respect to whether Officer Reese made such a comment. Detective Johns escorted Officer Reese out of the area, stating in a very loud voice, "He already asked for a lawyer. We cannot talk to him now." The two officers left the area.

The court observed that the statement of charges reflected death as the penalty for first degree murder, that appellee was in fact not eligible for the death penalty, and that the penalty was included by mistake on the part of Detective Johns or the court commissioner.

Applying an objective test, the court held that the comment by Officer Reese constituted interrogation and that Officer Reese intended to elicit a response from appellee. The court concluded that the State had not met its burden of showing that appellee subsequently voluntarily, knowingly, and intelligently waived his right to remain silent after requesting counsel. Specifically, the court stated that the State failed to prove that the waiver was "in no way due to the unlawful and coercive interrogation coupled with Defendant's receipt of the charging documents erroneously indicating that he was facing the death penalty."

The basis of the circuit court's opinion was that Officer Reese's comment constituted interrogation in violation of Miranda and Edwards, thus making appellee's subsequent waivers invalid and his statements inadmissible. The court made it clear that its decision rested on a violation of Miranda and Edwards, and not that appellee's statements were otherwise involuntary. With respect to the second statement given during the polygraph exam, and referring to appellee's testimony that he had been promised help, the court observed that it was not convinced that any statements had been made to appellee, promising that taking the polygraph test would help him.

Standard Of Review

As recently stated by the Court of Appeals in White v. State, 374 Md. 232, 250 (2003):

> On appellate review . . . we will accept the facts as found by the hearing judge unless those facts are clearly erroneous. See Riddick v. State, 319 Md. 180, 183 (1990). In addition, the evidence is to be viewed in the light most favorable to the prevailing party, [in this case, appellee]. See id. Nevertheless, we will undertake our own independent constitutional appraisal of the record by reviewing the law and applying it to the facts of the present case. See id.

Discussion

The State contends that the comment made by Officer Reese was not interrogation. Alternatively, even if it was interrogation, (1) it was attenuated by appellee's reading of the statement of charges and application, properly given to him, because appellee's statements were in response to what appellee learned in the statement and application and not in response to the interrogation, and (2) appellee was re-Mirandized and validly waived his rights prior to his statements.

Appellee contends that Officer Reese's statement was interrogation and that appellee's statements were, at least in part, in response to the interrogation, and that this Court is bound by the circuit court's findings in both respects.

We shall begin by applying the general standard of review to this case. We accept the circuit court's determination that Detective Johns was a credible witness and that Officer Reese made the comment in question. While it is not entirely clear whether the circuit court found that Officer Reese subjectively intended to elicit an incriminating response, we shall assume that he did. As it is a question of constitutional law, however, whether the police actions constituted interrogation is subject to de novo review. Riddick, 319 Md. at 183.

The parties argued, and the court discussed, cases dealing with Fourth Amendment rights, Fifth Amendment rights, Sixth Amendment rights, Miranda rights, the exclusion of evidence as a sanction for violations, and

waivers of the above rights by a person in custody. Although it is clear, as previously stated, that the court's conclusion rested on Miranda and Edwards, it is not clear whether the court (1) held as a matter of law that appellee's statements were inadmissible as a result of what it found to be unlawful interrogation, regardless of whether the statements were in response to learning from the statement of charges and application that Mr. Tolbert had identified appellee as the leading participant, as distinguished from Officer Reese's comment, or (2) whether the court found, as a fact, that appellee's statements were, at least in part, in response to the interrogation and thus tainted by the Miranda violation.

We shall summarize some basic principles to narrow our focus to what we perceive to be the determinative issue. The exclusionary rule does not serve the same purpose in Fourth Amendment and Fifth Amendment jurisprudence. Consequently, the fruit of the poisonous tree doctrine, a concept related to the exclusionary rule, is applied differently, depending on the nature of the violation. Oregon v. Elstad, 470 U.S. 298, 303-04 (1985).[2] In the former, the concern is with police conduct; in the latter, the concern is with trustworthiness of the information. Id.

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[2] The fruit of the poisonous tree doctrine requires a primary illegality and a cause and effect relationship between it and the evidence. The fruit is not poisoned if sufficiently attenuated from the illegality, was obtained from an independent source, or would have been inevitably discovered. See Judge Moylan's discussion in Gibson v. State, 138 Md. App. 399, 402-19 (2001).

Compare State v. Lee, 374 Md. 275, 297-98 (2003) (noting that the primary reason for excluding evidence obtained as a result of a Fourth Amendment violation is to prevent improper police conduct), with Ashford v. State, 147 Md. App. 1, 41-41 (2002) (citing Elstad and noting that the exclusionary rule, as applied to the Fifth Amendment, "is concerned with the ultimate trustworthiness of the evidence.").

In Oregon v. Elstad, the Supreme Court did not apply the traditional fruits doctrine, as developed in Fourth Amendment cases, to a Miranda violation. 470 U.S. at 318. A Miranda violation does not necessarily prevent subsequent statements from being admitted into evidence if the defendant is properly Mirandized before the statements are given and the statements are otherwise voluntary. Id. In other words, a mere Miranda violation, if followed by a voluntary and knowing waiver, does not trigger exclusion under the fruit of the poisonous tree doctrine. Id.

Apart from the Sixth Amendment, when a defendant requests an attorney, however, as opposed to merely invoking his or her right to remain silent, additional protections come into being. Edwards, 451 U.S. at 484-85. Once a person in custody requests the presence of an attorney, all interrogation must cease until an attorney has been provided. Id.; Miranda, 384 U.S. at 436. In that situation, the person in custody can initiate an exchange with the police and voluntarily speak, but the police cannot initiate the interrogation; if a statement is made in response to such an interrogation, the statement will be

suppressed. Edwards, 451 U.S. at 484-85. The act of re-Mirandizing, standing alone, even if voluntary in the traditional sense, will not avoid such a result. Id. The rule enunciated in Edwards was based on the rights outlined in the Fifth and Fourteenth Amendments. 451 U.S. at 480.[3]

That does not mean, however, that any and all subsequent statements by a defendant, made without counsel, are necessarily in response to the interrogation. See Correll v. Thompson, 63 F.3d 1279, 1287 (4th Cir. 1995). In the case before us, appellee testified that he felt angry, betrayed, and scared when he learned from the statement of charges that Mr. Tolbert had identified him as the shooter and driver and when he saw the possible penalties for this crime.[4] Appellee also referred to Officer

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[3] The inquiry into who initiated the conversation is separate from the issue of whether the accused waived his previously asserted right to counsel. Radovsky v. State, 296 Md. 386, 401 (1986) (quoting Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality). In addition to proving the conversation was reinitiated by the accused, the State also bears the burden of demonstrating that the accused voluntarily, knowingly, and intelligently waived his right to counsel. Id. In other words, the fact that an accused initiates the conversation with the police does not end the waiver inquiry.

[4] It is well-settled that the act of giving the application and statement of charges to appellee did not constitute interrogation. See State v. Conover, 312 Md. 33, 39 (1998). See also, discussion infra.

Reese's comment, however, when he explained why he changed his mind and decided to talk. Consequently, pursuant to our standard of review, regardless of whether the circuit court found as a fact that appellee's statements were at least partially in response to Officer Reese's comment or excluded appellee's statements as a matter of law, we shall assume that both statements were, at least in part, in response to Officer Reese's comment. Appellee was in custody when he gave his statements, and there is evidence that he invoked his right to counsel when he was first given his Miranda rights.

The net effect of the above is that the result in this case is determined by whether Officer Reese's comment, considering the totality of the circumstances, constituted interrogation after appellee invoked his Miranda rights, including the right to consult with counsel, and prior to the time that he indicated that he wished to speak to police.

Interrogation includes not only express questioning but also its functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). In Innis, the defendant was in custody, given Miranda warnings, invoked his right to counsel, and, while being transported to the police station, the police officers spoke to each other about their concern for the safety of children because a shotgun had not been recovered. Id. at 294-95. The defendant spoke, and the Supreme Court held that the defendant had not been interrogated. Id. at 302.

The Court explained that interrogation includes "words or actions on the part of the police (other than those

normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301. This portion of the definition focuses on the perceptions of the person in custody, rather than the subjective intent of the police. Id. "A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." Id. With respect to intent, the Court continued:

> This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

446 U.S. at 301, n.7.

The Court acknowledged its awareness that police officers might use various techniques of persuasion, such as using coached witnesses to identify the person in custody, and thus, interrogation was not limited to express questioning. Id. at 301-02. The concern in Miranda was that interrogation in custody would "subjugate the individual to the will of his examiner." 446 U.S. at 299. In reversing the Rhode Island Supreme Court, the Supreme Court acknowledged the state court's finding that

the defendant had been subjected to "subtle compulsion," but held that such behavior was not enough to constitute the functional equivalent of interrogation. 446 U.S. at 303.

The Court of Appeals interpreted and applied Edwards in Radovsky v. State, 296 Md. 386 (1983). In that case, the defendant was given Miranda rights, refused to waive them, and invoked his right to counsel. Id. at 387. The State conceded that it initiated the subsequent questioning of defendant, but argued that a subsequent waiver of his right to have counsel present attenuated the violation. Id. at 392. See Michigan v. Mosley, 423 U.S. 96 (1975). The Court, relying on Edwards, distinguished between the invocation of the right to remain silent and the right to have counsel present, and held that inculpatory statements obtained after the interrogation were inadmissible.[5] Id. at 398-99.

In determining whether the police interrogated appellee prior to the time that he asked to speak to Officer Johns, we consider the totality of the circumstances. Hughes v. State, 346 Md. 80, 95, 98 (1997). The test is objective; "whether the police officer, based on the totality of the circumstances, knew or should have known that the question was reasonably likely to elicit an incriminating response." Id. at 95-96. The subjective intent of the

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[5] The Court also noted that even if the person in custody initiates the interrogation by police after invoking a right to counsel, the prosecution still must show a valid waiver.

police officer in making the statements does not control. Id. at 100.

Importantly, following Innis, the Court of Appeals recognized that "[n]ot all police conduct that may cause a defendant to speak constitutes interrogation." State v. Conover, 312 Md. 33, 39 (1988). In Conover, the Court held that after the defendant requested an attorney, the actions of the police in reading a statement of charges and giving the defendant a copy of the statement and the application was not interrogation. Id. at 44-45. Consequently, the subsequent statement by the defendant was not excluded. Id. at 45. The Court reached the same result in White v. State, 374 Md. 232 (2003). In that case, the defendant invoked his right to counsel, the police read the charging document to him, and the defendant gave an inculpatory statement. Id. at 248-49. The Court held that the police conduct did not constitute interrogation, and the defendant's statement was not excluded. Id. at 254.

In the case before us, it is clear that simply providing appellee with the statement of charges and the application was not an interrogation. As the Court of Appeals observed in the above cases, the rules require that the charging document be served on the defendant. Maryland Rule 4-212(f). The charging document revealed to appellee the charges against him and the maximum penalty for those charges. As is customary, the statement was not tailored to appellee, and the police did not know prior to the statements in question that appellee was under age 18. Additionally, it was not interrogation to provide a copy of the application which contained information obtained from

Mr. Tolbert.

Appellee relies on Drury v. State, 368 Md. 331 (2002), but that case is distinguishable. In Drury, prior to being given Miranda warnings, the defendant was shown physical evidence and told that it would be processed for fingerprints. Id. at 337. The defendant was brought to the police station for the express purpose of questioning, and had been informed as much when he arrived. Id.

Appellee also relies on Hughes v. State, 346 Md. 80 (1997), but that case is also distinguishable. In Hughes, the Court of Appeals applied an exception to Miranda, known as the routine booking exception. Id. at 83. The Court held that the exception did not encompass a question on an arrest intake form that inquired whether the arrestee was "a narcotics or drug user." Id. at 97. It was clear that the defendant was being questioned. Id. It also seems clear that the question could reasonably be expected to elicit incriminating information. Id. at 98. Consequently, the admission in evidence of the response was error, absent Miranda warnings. Id. at 100-01.

In our view, this case is very similar to Williams v. State, 342 Md. 724 (1996). In Williams, the defendant was convicted of first degree murder and related offenses and received the death penalty. Id. at 731. The Court reversed the convictions for reasons not here material, but addressed issues likely to arise on retrial. Id. One of those issues was the defendant's motion to suppress statements made to the police. Prior to Miranda warnings, a police officer showed the defendant a photograph portraying him

using the victim's ATM card, and the defendant admitted it was him. Id. at 759. The defendant was then advised of his Miranda rights, and he invoked his right to remain silent and his right to counsel. Id.

The following transpired:

> As the officers began to gather their papers, one of the officers told Williams to remove his earring and Williams mumbled under his breath, 'you can't get me. I'll just say a girl gave me the card.' After this second statement, Detective Zywiolek testified that he commented that 'this is going to work' and reiterated to Williams that he was being charged with the murders of Gilbert and Trias. At that point, Williams made a third statement: 'I know I'm never getting out.'

342 Md. at 759. The Court held that the police actions did not constitute interrogation and Williams' second and third statements were not excluded. Id. at 760-61. The Court explained that the statement, "This is going to work," coupled with again advising the defendant that he was being charged with two murders, "simply advised Williams that police had evidence they believed established Williams's guilt in a double homicide, and as a result was being charged with murder." Id. at 761.

In the case before us, Officer Reese's comment was made during the non-interrogation procedure of giving appellee the charging document and the application. Appellee was in his cell; he was not taken anywhere for

questioning. The comment by Officer Reese was a blurt; viewed objectively it was rhetorical in nature and there was no actual questioning of appellee.

The comment was an obvious reference to the evidence in the possession of the police, as reflected in the application for charges. Regardless of what Officer Reese's intent might have been, the totality of the events indicate that appellee was not expected to respond, and he did not respond. There is no evidence that the events were part of a practice by the police designed to elicit incriminating information; it is to the contrary. Appellee was not "badgered" or subjected to "compelling influences" or "psychological ploys." See Conover, 312 Md. at 45. The statement by Officer Reese was not the functional equivalent of actual questioning, but was the functional equivalent of the statement in Williams, "This is going to work." Each was a reference to the evidence against the person in custody that the police had in their possession.

We hold that the police actions in question did not constitute interrogation.

ORDER GRANTING APPELLEE'S MOTION TO SUPPRESS REVERSED. COSTS TO BE PAID BY APPELLEE.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 771

September Term, 2003

STATE OF MARYLAND

V.

LEANDER JEROME BLAKE

Eyler, James R.,
Karwacki, Robert L.,
(Retired, specially assigned),
Bloom, Theodore G.
(Retired, specially assigned),

JJ.

Dissenting Opinion by Bloom, J.

Filed: October 29, 2003

Respectfully, I dissent.

I agree with most of the majority opinion. My sole point of disagreement with it is the majority's conclusion that, as a matter of law, the comment made by Officer Reese to appellee after the statement of charges and the application therefor were handed to appellee—"I'll bet you want to talk now, huh!"—was not the functional equivalent of interrogation. That one point of disagreement compels me to dissent from the decision of the majority to reverse the order of the circuit court granting appellee's motion to suppress inculpatory statements he made after he had requested a lawyer upon being advised of his *Miranda* rights.

The suppression motion hearing judge made specific findings of first level facts, which this Court must accept unless they are clearly erroneous. *Riddick v. State*, 319 Md. 180, 183 (1990). Of particular significance to this case were her findings (1) that when Officer Reese said to appellee, "I'll bet you want to talk now," he intended that comment to induce appellee to talk, *i.e.,* to make an incriminating statement, without waiting for advice of counsel; and (2) that Officer Reese's comment was a factor in inducing appellee to waive his right to counsel and tell Detective Johns his version of what occurred in the events that led to his arrest.

There is no contention that those findings of intent and motivation were not findings of first level facts. In the words of Lord Bowen's famous aphorism, "The state of a man's mind is as much a fact as the state of his digestion. *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459, 483.

Nor is there any contention that those findings were erroneous or that there was no evidence to support them. The finding that Reese's comment was a factor in appellee's decision to waive his right to counsel and tell his version of the events to Detective Johns is supported by his testimony to that effect. The finding that Officer Reese intended his comment to induce appellee to talk, *i.e.*, to tell his version of the event without waiting for advice of counsel is supported by the surrounding circumstances. Detective Johns had read the list of charges to appellee, handed appellee the statement of charges with the application therefor, and told him to read them carefully and that the charges were serious. Then, as Johns turned to walk out, Reese said in a loud voice and a confrontational tone, "I'll bet you want to talk now, huh!" The only logical conclusion was that Reese was suggesting that, when appellee read the charges, with the maximum penalty for each charge noted, and Tolbert's assertion that appellee was the one who killed the victim, he would want to tell his version "now." Detective Johns clearly thought so. He was surprised and angry; he pushed Reese out of the cell and he said that Reese had interjected police interrogation into a situation in which appellee had invoked his right to counsel. He testified that he was afraid that Reese had violated appellee's right to counsel.

Despite the factual determination by the motion hearing judge, the majority hinges its decision on the proposition that whether police actions constitute interrogation is a constitutional law question and thus subject to *de novo* review, citing *Riddick*, 319 Md. at 183.

The evidence clearly shows that when Detective Johns returned to the holding cell to deliver appellee's clothing to him, appellee initiated the ensuing interrogation; he wanted to talk about the case. During the relatively short period of time before Johns returned to the holding cell with appellee's clothes, appellee had read the statement of charges with the computer generated maximum penalty (death for first degree murder) clearly stated thereon, and he was frightened. He had also read the police application for the charging document and was disturbed by Tolbert's accusation that appellee had shot and run over the victim with the carjacked vehicle. And he had thought about the meaning of Reese's statement, which indicated to him that it was in his best interest to make a statement promptly, so that the police would know the truth about what Tolbert said. Certainly appellee's inculpatory statements were made voluntarily. The issue, however, is whether they were induced by a "substantial equivalent of interrogation" that influenced his waiver of a right to counsel.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court explained that, once an individual has requested counsel, a subsequent statement by him is not tested by the standard of voluntariness; the issue is whether there was a knowing and intelligent waiver of the right to counsel.

> "Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S. at 474.

451 U.S. at 485. *See also Michigan v. Mosley,* 423 U.S. 96 (1975).

Prior to *Edwards,* the Court, in *Rhode Island v. Innis*, 446 U.S. 291, had addressed the meaning of "interrogation." It stated:

> *Miranda* safeguards come into play whenever a person in custody is subjected to either express questions or its functional equivalent. That is to say, the term interrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

446 U.S. at 300-01.

That "interrogation" or the functional equivalent thereof need not be in the form of questions, or even verbal, is illustrated in *Drury v. State,* 368 Md. 331, *cert. denied,* 537 U.S. 942 (2002). In that case, the Court of Appeals held that the conduct of a police officer in placing in front of the defendant, before he had been advised of his *Miranda* rights, the tire iron used in a burglary and a trash bag containing stolen magazines and then telling the defendant that the evidence will be processed for fingerprints, was the functional equivalent of

interrogation.

The motion hearing judge correctly concluded that Officer Reese should have known that his statement to appellee was reasonably likely to elicit an incriminating response from appellee. She had found as a fact that Reese intended his comment to elicit such a response. And as the majority opinion recognizes, the officer's intent may have a bearing on whether he should have known that his words "were reasonably likely to evoke an incriminating response." Slip op. at 18. In short, based on the evidence and the first level facts she found on the basis of evidence, the motion hearing judge properly ruled that Reese's remark was the functional equivalent of interrogation; that as such it violated appellee's constitutional rights; and that the State had not met ".ts heavy burden" of proving a voluntary, knowing, and intelligent waiver, uninfluenced by Reese's improper comment. On that basis, she held that all statements made by appellee at the Annapolis Police station and at the State Police Barracks (where the polygraph examination was conducted) were suppressed.

I am aware that, by virtue of Maryland Code (1974, 2002 Repl. Vol.), § 12-302(c)(iv) of the Courts and Judicial Proceedings Article, an affirmance of that suppression ruling would result in dismissal of all charges against a defendant who had voluntarily admitted his participation in a carjacking and murder. That would be an extremely harsh penalty for the State, which was not prepared to proceed to trial without the suppressed evidence. Dura lex sed lex.

APPENDIX C

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

STATE OF MARYLAND,	*	
	*	
v.	*	Criminal Nos. K-2002-2154
	*	K-2002-2417
LEEANDER JEROME BLAKE,	*	
	*	
	*	
Defendant.	*	
	*	Annapolis, Maryland
		June 3, 2003

MOTIONS HEARING

WHEREUPON, proceedings in the above-entitled matter commenced.

BEFORE: THE HONORABLE PAMELA L. NORTH,
Judge

APPEARANCES:

FOR THE STATE:

FREDERICK M. PAONE, Esq.
PAMELA ALBAN, Esq.
Office of the State's Attorney
Circuit Courthouse
7 Church Circle, Suite 200
Annapolis, Maryland 21401

PROCEEDINGS

THE COURT: Good morning, everyone. You can be seated.

MR. PAONE: Good morning, Your Honor. If it please the Co rt, the State would call State versus Leeander Jerome Blake, K-2002-2154 and 2417. I am Fred Paone on behalf of the State.

MS. ALBAN: I am Pamela Alban.

THE COURT: Good morning.

MR. RAVENELL: Good morning, Your Honor. For the record, Ken Ravenell and Ivan Bates on behalf of Leeander Blake.

THE COURT: And for the record, Mr. Blake is present in the Courtroom. All right. We are here, of course, today for me to give you my oral opinion on the motion to suppress in both of these cases.

I am going to start with the law. Under Miranda versus Arizona, the defendant must be informed of his right to counsel and right to an attorney prior to any custodian interrogation.

The Miranda court stated,

"If the accused indicates that he wishes to remain silent the interrogation must cease. If he requests

counsel the interrogation must cease until an attorney is present. This is an important distinction highlighted in many, many subsequent opinions."

That is the difference between asking for an attorney and simply saying you want to remain silent.

"The right to have counsel present can be waived, of course, but the waiver of counsel must not only be voluntary, it must also constitute a knowing and intelligent relinquishment or abandonment of a known right. A matter which depends in each case upon the particular facts and circumstances of each case."

That is taken from Johnson versus Serbs. "The state must prove an intentional relinquishment or abandonment of a known right or privilege." Again, from Johnson versus Serbs.

"Courts indulge every reasonable presumption against waiver." Supreme Court case, Brookhart versus Janis, 384 United States 1. Also quoted in Johnson versus Serbs, and quoted in a number of a number of Maryland cases as well.

Edwards versus Arizona at 451 United States 477, is most instructive in this case. It makes two points crystal clear. In that case the Supreme Court pointed out that the state court may have, in fact, been correct when it assessed that Edwards' statement was given voluntarily.

But that the state court completely missed the mark by not focusing on whether he had made a knowing and intelligent waiver of his right to counsel. By focusing on whether the giving of the statement was voluntary, the court stated, quote,

> "It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel once it has been invoked."

That is at page 484.

In the Edwards case, I quote,

> "Although we have held that after initially being advised of his Miranda rights, the accused may himself validly waive his rights and respond to interrogation. The court has strongly indicated that additional safeguards are necessary when that accused has asked for counsel.
>
> And we now hold that when an accused has invoked his right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated custodial interrogation even if he has been advised of his rights.
>
> We further hold that an accused such as Edwards having expressed his desire to deal with the police

> only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Again, that is Edwards at page 484.

> "A statement made to a person in custody, which is reasonably likely to elicit an incriminating response has been repeated held to be interrogation. Whether it is in fact a question. Whether it is a statement. Or any number of acts which have been held to the functional equivalent of interrogation."

That is cited as Brewer versus Williams.

State versus Connover at 312 Md. 33, held that police reading a statement of charges to a defendant and handing him copies did not constitute interrogation. And, therefore, did not deprive him of the Fifth Amendment right to counsel.

However, confronting a defendant in custody with physical evidence of a crime and telling him that the evidence would be processed for prints was held to be an example of the functional equivalent of interrogation.

Showing the defendant a copy of an incriminating document has been held to be the functional equivalent of interrogation.

In White versus State, the Maryland Court of Appeals held that when police officers disclosed the contents of a charging document to a suspect in custody, after he had invoked his Miranda rights, there was no impropriety because Maryland Rule 4-212 required them to serve the charging document on the defendant.

White also stated that a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privileged against self incrimination and his right to counsel when it attempts to prove a waiver of Miranda rights.

And just as an interesting aside, it's interesting that the ease law talks repeatedly about that the case law talks repeatedly about the heavy burden on the State to demonstrate a knowing intelligent waiver. And they never define that. They just say it's a heavy burden. They don't say anything that we would understand. They don't say preponderance or clear and convincing or what.

In contrast, as the State pointed out, and I think correctly in their memo, the burden appears to be simply preponderance for showing voluntariness. So, we are talking about two different issues. Voluntariness versus the burden that rests on the State to show a knowing and intelligent waiver.

The White case further stated,

"Even if a question appears innocuous on its face, however, it may be beyond the scope of the

routine booking question exception if the officer knows or should know that the question is reasonably likely to elicit an incriminating response. Assessment of the likelihood that an otherwise routine question will invoke an incriminating response requires consideration of the totality of the circumstances in each case. With consideration given to the context in which the question is asked.

The fact that the answer to a booking questions assists the prosecution in proving its case is not determinative of whether a standard booking question, when posed, was likely to elicit an incriminating response. A benign question in one case may amount to interrogation for which Miranda warnings would be required in another case.

Therefore, courts should carefully scrutinize the factual setting of each encounter of this type keeping in mind that the critical inquiry is whether the police officer based on the totality of the circumstances knew or should have known that the question was reasonably likely to elicit an incriminating response."

That language, I feel is very, very important in this case. Again,

"Courts should carefully scrutinize the factual setting of each encounter keeping in mind that the critical inquiry is whether the police officer [,] based on the totality of the circumstances [,] knew or should have known that the question was reasonably likely to

elicit an incriminating response.

> Consequently, our holding in Hughes reaffirms that our case by case review should focus on the conduct of law enforcement officers in obtaining the incriminating statement when assessing whether a Miranda violation has taken place."

In Ratavosky, similar to this case, defendant after being arrested for burglary invoked his right to counsel. Over the next two days police initiated conversations with him relative to other crimes. Ratavosky later signed a Miranda waiver form waiving his right to counsel and his right to remain silent.

These statements were ultimately suppressed by the court because the police initiation of conversations with the defendant was improper. This is a case like Mr. Blake's where he has invoked his right to counsel, was re-Mirandized and he waived rights on paper and the court still found no valid waiver existed.

Like Edwards versus Arizona, the case of Michigan versus Mosely distinguishes between an invocation of a right to an attorney and in invocation of the right to remain silent. An attorney must be furnished before any interrogation occurs when defendant has requested counsel.

Fair versus Michael, another Supreme Court case at 442 United States 707, stated, "There is a per se prohibition against all interrogations after an arrestee has requested

counsel."

In Ratavosky, three hours passed between his invoking right to counsel and police interrogation. In Edwards versus Arizona, 12 hours. And in our case it's either 28 minutes if you are looking at the first statement. Or one and a half to two hours if you are looking at the second statement.

Ratavosky further stated, quote,

> "But even if a conversation taking place after the accused has expressed his desire to deal with the police only through counsel is initiated by the accused where reinterrogation follows, the burden still remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during that interrogation."

Most interesting to me is the fact that Ratavosky's entire analysis is a Miranda analysis. Not a voluntariness of confession analysis. Leading to the conclusion that where there is a Miranda violation of the defendant's right to have counsel present before any interrogation occurs, the court's initial and primary focus should not be on whether or not the confession was voluntary. But as in Edwards[,] and Edwards made clear[,] a knowing and intelligent waiver existed.

Finally, worth mentioning are the cases Kaupp versus Texas, a May 5, 2003 Supreme Court decision and Jones

versus State of Maryland, at 311 Md. 398. Jones essentially stands for the proposition that where the arrest of a juvenile is concerned, parental notification or the presence of parents are important factors in determining voluntariness of a confession, but lack of access to parents does not automatically make the juvenile's statement inadmissible.

Kaupp is a case decided on a slight different issue. An illegal arrest. But it is very similar to our case factually. In that case a 17 year old was removed from his house at 3:00 in the morning, awakened from his bedroom with a flashlight, handcuffed, shoeless, in boxer shorts and a t-shirt.

That case citing Brown versus Illinois, another Supreme Court case with approval, held that Miranda warnings alone and per se cannot always break for Fourth Amendment purposes the causal connection between the illegality and the confession.

The State urges the Court to take an approach where voluntariness is considered first and asks the question, was the Defendant's will overborne by any improper police conduct. I believe the case law requires instead, on these facts and these issues, that the Court analyze the Miranda slash right to counsel issue first.

In fact, as Ratavosky instructs, where there is an insurmountable Miranda violation sometimes the Court does not get to the voluntariness of the confession itself.

This is true simply because as Edwards versus Arizona makes clear, waivers must meet three types of criteria. One, voluntariness. Two, they must be knowing. And three, it must be an intelligent relinquishment of known rights. Not just voluntariness of confession.

It is important not to fall into the same trap as did the Arizona State Court in Edwards versus Arizona, and focus solely on whether the confession was given voluntarily instead of focusing on whether the Defendant understood his right to counsel and intelligently and knowingly relinquished it.

So I am convinced the first inquiry for this Court must be made on the right to counsel issue. Here, we have a 17 year old young man removed by force on a chilly October morning somewhere between 4:30 and 5:00 o'clock in the morning. Ordered at gunpoint to lay on the floor. He is handcuffed. Removed from his home in his underwear with no shoes on.

Circumstances were sufficiently compelling that Defendant apparently said, "Don't shoot" to the officers. Approximately a dozen armed police officers were present inside and out without consultation with or knowledge of his mother. He was taken directly to a police car out front and driven three to four miles to the Annapolis Police Department.

This 17 year old is of average intelligence. Can read and write. Completed the tenth grade. Had thoughts of going to college and becoming an electrician. And was

very polite and cooperative with authority figures.

This 17 year old had been arrested for drug charges on two prior occasions, but had never been advised of Miranda rights or interrogated by police before. He was sober, not on any medication, had used marijuana numerous times in the past, but there was no evidence of any use near the time of his arrest. He indicated he had a sip of alcohol at 9:00 or 10:00 the previous evening.

The first question I would ask is was he in custody? I believe the State concedes that he was. He was arrested, cuffed pursuant to a valid arrest warrant. And was not free to leave. He was therefore in custody.

The next question I would ask is was he advised of his rights pursuant to the Miranda decision? The answer should be yes. And it is. Immediately he was advised. I believed both Officers Johns and Hannon when they testified the Defendant was not told of his charges or advised of the fact that Tolbert had accused him of being the shooter. Neither Johns or Hammond were armed. And they were the only two present with the Defendant.

Next question, did Blake invoke his right to counsel? The answer is yes. He requested the presence of an attorney before any questioning could occur. He signed an advice of rights form at 05:11 hours. At this point, Miranda and Edwards require that the Defendant be afforded an attorney before any interrogation by police.

There were no questions or interrogation by police at

this point. He was then transported to a cell by 5:25 a.m. in the morning. Evidence revealed that the cell was chilly, cold, and room temperature. All three different descriptions that Detective Johns gave at various times in his testimony.

The Defendant was still in underwear with no shoes on. During this time, the Defendant made no statements and asked no questions. There was, as of this point, no indication the Defendant would change his mind.

At approximately 6:00 a.m., Detective Johns and Officer Reese, and Officer Reese, by the way, was the same officer who had previously transported the Defendant to the Annapolis Police Department. They both walked back to his cell.

As in Edwards, Defendant did not request or suggest that the officers should come back to his cell. Defendant was awake. Johns took the statement of charges back to the Defendant, handed them to him, and read the charges to him. Johns testified, and this is a quote, "I said to him, they are serious charges. He needs to read it carefully and make sure he understood it."

As Johns turned to walk out, Reese said, in a confrontational loud voice, "I bet you want to talk now, huh!" Johns testified he was surprised by this. Later, Sergeant Kirchner testified that he observed that Johns was very angry about this. And it was told that Johns put his hands in front of him and pushed slashed escorted Reese out of the area, stating in a very loud voice, "He

already asked for a lawyer. We cannot talk to him now."

They left and shut the door. It should be noted that almost contemporaneously with Reese's statement, Johns had handed Defendant the statement of charges, read them to him, advised him that they were serious charges and that he should read over them.

He also erroneously served him with a document which stated that the penalty for count one murder was death. The word death being written in all capital letters. Defendant was, in fact, not eligible for the death penalty.

This was either done intentionally or by mistake. Given the Court's perception of Detective Johns' testimony on the whole, however, as being very credible, and even testifying to matters which are certainly not in his best interest, I believe this was done by mistake on his part or on the commissioner's part.

No matter who was responsible for death being typed in capital letters on the penalty section for murder, it was still State action.

So the next question is was there interrogation? Was there a statement made by the police which the police knew or should have known would be reasonably likely to elicit an incriminating response? That answer has to be yes. And, in fact, I had already concluded as much at the motions hearing.

Under the relevant case law which I have now had an

opportunity to study since that day, there is simply no possible interpretation of Reese's statement and the manner in which it was made which could indicate that it is not interrogation.

The Defendant had seen Reese before. Reese transported him to the police department. It cannot be said that that statement was a part of the routine booking questions.

Detective Johns testified that Reese knew that Mr. Blake had invoked his right to counsel before they went back to the cell. The State in its memorandum has variously characterized Reese's statement as, I quote, "A single off handed statement." Later it was characterized as, again quote, "A snide off handed comment." And again, the State characterized it as, I quote, "An improper off handed comment by an inexperienced police officer."

The State goes on to point out that there was no common design between Johns and Reese to get the Defendant to talk. The State further argued that Johns took corrective measures immediately after he heard Reese make that remark.

The State wrote in its memo, and I quote,

"These actions taken on the part of Detective Johns clearly eliminate any notion that Officer Reese's comment was designed to elicit any type of response from the Defendant."

On the contrary, what those actions by Detective Johns suggest is precisely what he stated at the motions hearing, which was that Reese had interjected police interrogation into a situation where Defendant had invoked his right to counsel. He testified he was very concerned that Reese's statement to Defendant violated his right to counsel. And I think Detective Johns was right about that.

I believe the State's argument misses the mark when it focuses on what Johns intended or did not intend. Reese is also a police officer. He constitutes State action. And he clearly intended that the Defendant make a statement.

There is no requirement in a right to counsel analysis that more than one police officer intend to elicit an incriminating statement from a Defendant. The fact that Johns may not have intended it and other members of the police department did not intend it, does nothing to negate Reese's obvious intent.

So the question is how do we know what Reese intended. Well, let's analyze the remark he made. Defendant is handed a statement of charges indicating to him, a 17 year old, indicating to him for the first time that he is being charged with murder and he can get the death penalty.

Reese's statement was, "I bet you want to talk now, huh!" This is not a vague appeal to Defendant's conscious like the remarks were in Brewer versus Williams. First, the statement, itself, suggests he should want to talk. And the word, "now" that is, "I bet you want to talk now"

clearly refers Defendant to what has just been handed to him.

In other words, look at those charges, look at that penalty, and I'll bet you will want to talk. What ever other meritorious arguments the State makes with reference to this motion, it is simply impossible for this Court to conclude that that particular statement is not interrogation.

It is a statement made specifically for the purpose of getting Mr. Blake to talk. In fact, Mr. Blake's question is indirect response to Reese's previous statement. The police left the cellblock area immediately after Reese made that statement.

So, until 6:28 when they came back there had been no opportunity for the Defendant to ask if he could talk to them. Since 28 minutes had passed, he asked, "I can still talk to you?" Even though that period of time had passed.

Is there any possible interpretation of that statement that it is, as the State has urged the Court to find, simply an innocent offhanded comment not meant or expected to elicit an incriminating response? I don't think so.

Examples of innocent offhanded comments not likely to elicit an incriminating response would be, quote, "Here are some clothing for you." Or, "Please move away from the door so I can unlock it." Or, "Do you need a drink of water."

United States versus Walker instructs courts to look at

the context in which the statement is made. Once again, the context is the statement was made to a 17 year old with no Miranda or interrogation experience, who was still in a chilly cell in his underwear with no shoes on, without a parent present or available, just as he is being handed papers advising him he is charged with murder and can get death.

The statement invites him to look at those documents when Reese says "now" because nothing else has occurred but the handing over of those documents to which Reese could possibly be referring.

The law states that merely giving the Defendant a copy of his charges does not amount to interrogation and is part of a lawful booking process. Had Defendant been handed a statement of charges indicating he was charged with shoplifting or possession of marijuana, with maximum penalties of 18 months or one year, Reese's statement would not have had nearly the impact it did in this case.

That statement, under these circumstances, was enough to make an adult repeat offender squirm, not alone a 17 year old.

To conclude on this issue there was interrogation before counsel had been provided to Blake. The interrogation was of a coercive nature. And spoke directly to getting the Defendant to talk. And that constituted a violation of the holdings in Miranda and Edwards versus Arizona.

The Court must address though the obvious conflict in

the evidence about whether Officer Reese was ever even in that cellblock along with Detective Johns. And whether he ever made the statement to the Defendant which has been attributed to him.

The Court finds Detective Johns to be the more credible witness. That is more credible than Officer Reese. This is for a number of reasons. Number one, police are not likely to make up facts which are highly damaging to their own case. If police were inclined to make up facts, common sense dictates that those facts would be helpful to their case and not harmful to their case.

Two, Detective Johns testified in a manner which I found convincing and truthful. Three, Detective Johns did not keep this whole matter a secret like he could have. He could have been dishonest. He could have withheld this. Instead he told his supervisor about it, who told him to put it in a report, which he did.

Four, Officer Johns' version is corroborated by the Defendant's version. Five, Officer Reese is the only person who said Defendant spontaneously sated, not in response to any question or remark, "I want to talk to someone." Followed by Reese saying, "Who?" And the Defendant saying, "The detectives."

Officer Reese's testimony regarding other issues about who was at the station first conflicted with Officer Hannon's and Detective John's testimony.

And finally, my seventh reason, Sergeant Kirchner's

testimony regarding what Detective Johns told him on October 26th is almost identical to what Officer Johns' testimony was and not even close to what Officer Reese's testimony was.

So I believe Officer Johns' version and not Officer Reese's version. To add to the coercive nature of the situation in the cellblock, I was struck by how much this scene looked like a good cop, bad cop routine. Not that there is anything per se illegal about good cop, bad cop, as an interrogation technique, if the interrogation does not otherwise afoul of the law.

This view of the actions of the police in the cellblock bolsters the Defendant's testimony when he stated he was scared, shook when he heard Reese make that remark and saw he was facing death.

The police testified Defendant was calm, polite and cooperative. Reese appears in this setting, in that cellblock, as an out of control, not by the book, police officer, being reigned in by Detective Johns when Johns pushes Reese out of the cell and states in a loud voice that the Defendant said he wanted an attorney. This adds to the coercive atmosphere. It does not detract from it.

Now I turn to wether the Defendant voluntarily, knowingly, and intelligently waived his right to an attorney. At about 6:28 a.m., Detective Johns returned with clothing for the Defendant. The Defendant has been in police custody since 5:08 and at the Annapolis police department since 5:11, and in the cell since 5:25.

So at least one hour he has been in the cell without clothing. No counsel has been provided to him. Defendant says, "I can still talk to you?" Defendant has no initiated a conversation with Johns after he has been interrogated without counsel 28 minutes earlier.

Defendant was asked if he changed his mind and he stated, "Yes." Detective Johns was interested in knowing why the Defendant changed his mind, but he did not inquire. Defendant was readvised of his Miranda rights, signed the form indicating he would speak to them without an attorney.

Aside from what occurred at 6:00 o'clock that morning, there had been no other threats, physical coercion, or promises made at this point to get the Defendant to talk. Defendant never requested to see or speak with his mother.

It is of some concern, however, that Detective Johns did not testify that he made any effort, whatsoever, to obtain an attorney for the Defendant so that he could question him. Defendant thereafter made an incriminating statement.

At this point the State has a heavy burden of proving that a Defendant voluntarily, intelligently, and knowingly waived his previously invoked right to counsel. And that his pro forma waiver was in no way due to the unlawful and coercive interrogation coupled with Defendant's receipt of the charging documents erroneously indicating that he was facing the death penalty.

Detective Johns testified that he did not know if Reese's comment had had an impact on the Defendant's change of mind. But again I quote from Ratavosky,

> "Even if a conversation taking place after the accused has expressed his desire to deal with the police only through counsel is initiated by the accused where reinterrogation follows the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation."

Here, Defendant is still in custody, still at the Annapolis police department. Only 28 minutes has gone by since the illegal interrogation. Enough time for him to read the charging document and only one hour and 17 minutes since he invoked his right to counsel.

He is still 17 years old. Still undressed. Still in a cold cell, where he is facing death. And an officer had made a case for him to speak now through that officer's coercive statement.

He has no parent present. The Defendant testified that he was scared and cold and though he was facing death. The State urges the Court to accept that Officer Reese's statement did not impact the Defendant's change of mind, but the Defendant changed his mind after reading the statement of charges and learning his co-defendant had pointed to him as the shooter.

And further, that since it has been held that the mere act

of providing a defendant with a statement of charges does not amount to unlawful interrogation, it was not an illegal police action which prompted him to confess.

The problem is there is very little evidence of that. Defendant conceded he learned that Tolbert blamed the murder on him and that he wanted the police to know the truth about these statements.

The State has not met its heavy burden of proving a voluntary, knowing, and intelligent waiver or showing that he was not still suffering under the impact of Reese's unlawful course of interrogation.

Once Defendant made certain incriminating statements, he was then asked by Detective Johns if he wanted to take a polygraph. This is all one continuous stream of events. There was no break in time or place here. No attenuation.

Defendant testified he asked if it would help him and Detective Johns said, "Yes." Detective Johns and Detective Hannon testified that it was possible that the Defendant could have been asked that question.

Detective Hannon testified that if he was asked the question that he, Hannon, definitely did not answer yes to the Defendant. And he does not know whether Detective Johns told the Defendant it would be helpful if he took a polygraph.

According to the Defendant, he also asked Lloyd White if it would help if he took a polygraph. And White

testified that he did not recall if Defendant asked that question.

I am very uncertain, actually, based on the evidence I have heard, whether or not the Defendant ever asked that question. According to Officer Hannon the Defendant may have asked that question.

But even if he did not ask that question, that failure on his part to ask the question and receive an affirmative response by the police does nothing to assist the State in overcoming their heavy burden of showing a knowing and intelligent waiver, not influenced by Reese's statement.

The polygraph process began at about 8:30 or 9:00 o'clock with Defendant's mother present at the Maryland State Police barracks. She signed a consent form but never saw or spoke to the Defendant. We now have a change of location and the re-Mirandaizing of the Defendant.

However, this is all one continuous course of conduct beginning with Office[r] Reese's statement and other coercive circumstances. Defendant had, as some cases talk about, already let the cat out of the bag. It is unlikely that an honest 17 year old who is respectful of authority would realize he could turn back now.

There was no lengthy period of time as we see in some cases to break the chain of events and to prove attenuation. In any event, viewing the evidence under the totality of the circumstances, the Defendant did invoke his right to

counsel.

He was thereafter interrogated by police in violation of Miranda and Edwards. The State must prove his subsequent pro forma waiver was not the result of the previous coercive unlawful police conduct. And they have not met that heavy burden.

The motion to suppress is therefore granted as to any and all statements Defendant made at the Annapolis police department. And any and all statements that he made at the Maryland State Police barracks.

Is there any further at this time, then?

MR. PAONE: No, Your Honor.

MR. RAVENELL: Nothing from Defense, Your Honor. Thank you.

MR. PAONE: Excuse me, Your Honor. Your Honor, the State would request that the Court make a finding regarding voluntariness of the statement for possible impeachment purposes down the road.

THE COURT: Okay.

MS. ALBAN: To consider it at some point - -.

MR. RAVENELL: Are you asking for that now or later?

MS. ALBAN: No. No. If the Court, I mean, I don't know if the Court is prepared. I mean I understand we can't use the statement now in our case in chief. But, if the Court finds it involuntary, we can't use it for impeachment purposes. If the Court finds that it was voluntary, we may be able to use it for impeachment purposes should the Defendant take the stand.

THE COURT: Okay.

MS. ALBAN: So, prior to the trial date.

THE COURT: Well, just by way of comment, I mean, if you want me to address that in more detail, I will. I felt that that was what I was addressing in the latter part of my opinion.

MS. ALBAN: Okay. I just wanted to clarify.

THE COURT: Where I went from the original Miranda analysis into the whole voluntariness analysis.

MS. ALBAN: Thank you. I just wanted to be crystal clear on that. Thank you.

THE COURT: Okay. You are welcome.

MR. RAVENELL: Thank you, Your Honor.

(Whereupon, the hearing was concluded.)

APPEARANCES (Continued):

FOR THE DEFENDANT:

KENNETH W. RAVENELL, Esq.
Schulman, Treem, Kamikow,
Gilden and Ravenell, P.A.
World Trade Center
401 E. Pratt Street, Suite 1800
Baltimore, Maryland 21202

IVAN JULES BATES, Esq.
724 Reservoir Road
Baltimore, Maryland 21217

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Keynote: "- - -" indicates inaudible in the transcript.

CERTIFICATE

CompuScribe hereby certifies that the attached pages represent an accurate transcript of the duplicated electronic sound recording of the proceedings in the Circuit Court for Anne Arundel County in the matter of:

Criminal Nos. K-2002-01254
K-2002-02417

STATE OF MARYLAND

v.

LEEANDER JEROME BLAKE

By:

Janice T. Warner, Transcriber